Response and Comment of the

Aerospace Industries Association
Contract Services Association
Government Electronics & Information Technology Association
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the Preliminary Working Draft of the Commercial Practices Working Groups of the

Acquisition Advisory Panel

Provided via email on July 19, 2006

To The Reader:

The original text of the Preliminary Working Draft of the Commercial Practices Working Group of the Acquisition Advisory Panel has not been modified and appears in Times New Roman text and black lettering. Comments of the Multi-Association Working Group (MA) have been highlighted and inserted where relevant as Tahoma text and is in red lettering.

Multi-Association Comments to the Preliminary Working Draft of the Commercial Practices Working Group Report Sections 1 & 2

OVERVIEW

As a general comment, Section 1 (Background) would be more meaningful if it was half as long and treated selected matters in depth. The discussion tends to wander in several places, and in other places makes unsupported statements and claims that would be more appropriately treated in the analysis section. The Multi-Association groups would suggest that Section 1 use FASA as a starting point and only refer to pre-FASA events where necessary (e.g., Section 800 Panel).

The most serious flaw of Section 1 is its lack of balance. Nowhere does the discussion reference, much less respond to, the issues and concerns raised by private industry for which there is an abundant and clear record (e.g., CODSIA papers, OFPP Petition, ARWG papers, Multi-Association paper, etc.). This disturbing omission, if left uncorrected, could support criticism that the Panel's work is biased.

Another critical flaw is that Section 1 confuses the concepts of the Government's buying commercial products to satisfy its needs with the Government's use of commercial practices. These are not the same. As such, it misstates the intended purpose of legislative and regulatory initiatives. In other places, the background seems to misinterpret FASA and FARA history. Moreover, in several places, we take issue with the causes and effects attributed to FASA and FARA, as well as regulatory implementation. Section 1's treatment of pricing concepts is seriously flawed. Particularly troubling is the discussion about TINA, cost or pricing data, and cost or price analysis.

COMMERCIAL PRACTICES WORKING GROUP REPORT
SECTIONS 1 AND 2

I. Background – Government Efforts to Use Commercial Practices

A. Introduction

Acquisition and process reform has been the subject of numerous studies and implementation efforts over the past four and a half decades.[1] A decade ago, following up on internal DoD initiatives and the work of the Section 800 Panel, The Federal Acquisition Streamlining Act of 1994 ("FASA")[2] and the Federal Acquisition Reform Act ("FARA")[3] were enacted. The studies, FASA and FARA, were an effort to make the federal procurement process more commercial-like and to simplify the federal procurement process in the belief that a simpler and more commercial-like process would increase government access to private sector technology and the growing private sector development of technology-related services. The reforms of the mid-90's adopted some commercial practices in government procurement and encouraged the purchase of commercial products and services rather than acquisitions tailored to unique government specifications giving the Government access to commercial solutions, reducing the cost of major systems, improving the overall quality of contractor performance and shortening the time it takes to purchase goods and services that support agency missions. Those reforms have expanded the definition of commercial items to encompass not only goods but virtually all types of services.[4] [**MA COMMENT:** As will be noted later, Section 1 appears to be based on a false premise that FASA sought to make the Government adopt commercial practices. It then argues that the Government can never truly be a commercial buyer. More accurately, FASA sought to provide greater access to commercial markets, technologies, and process by relying on commercial market acceptance rather than Government-imposed rules, specifications, and systems. FASA did not make the Government *adopt* commercial practices; instead it encouraged the Government to *accept* commercial practices when buying a commercial item. Also, services were considered to be commercial items long before FASA. If anything, FASA has been criticized in that area as making matters worse.]

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[1] The Defense Acquisition Performance Report. January 2006. (Citing 128 acquisition-related studies that preceded it. See Appendix E).
[2] P.L. No. 103-355, 108 Stat. 3243 (1994); codified at 41 U.S.C. § 403.
[3] Add Citation
[4] Carter, Ashton B. and John P. White. "Keeping the Edge, Managing Defense for the Future." MIT Press, 2001 [**MA COMMENT:** This would not appear to be an authoritative source for the point in the text.]

The most significant acquisition reform involving commercial items and services was FASA, which became law on October 13, 1994. This law was intended, among other purposes, to make it easier for the Government to acquire goods and services from the commercial marketplace. FASA made a wide range of changes in acquisition policy and procurement law by exempting purchases of commercial products from several statutes, while expanding the definition of a "commercial product." FARA made additional statutory changes, such as the elimination of certain cost-accounting standards that, according to popular belief, discouraged commercial companies from doing business with the Government. FASA and FARA set the stage for changing the focus from oversight to insight, reducing government oversight, simplifying the process for entering into contracts, and attempting to align government contracting more closely with commercial practices. Senior government officials, including the President, Vice President, and the Secretary of Defense, expressed concern that the Government was paying a regulatory premium for its reliance on a cost-based acquisition regulatory scheme; that is, its reliance on the Truth in Negotiations Act ("TINA"), government specific Cost Accounting Standards ("CAS"), and associated reporting, auditing, and oversight mechanisms. When the Government is not acquiring government unique products and services, the presumption in FASA and FARA is that insight into a seller's costs was the least preferable method for determining a fair and reasonable price. The focus was on establishing a fair and reasonable price through other market based methods including competition, historical pricing, benchmark pricing, *etc.* However, in circumstances where market forces are not active, this presumption is questionable. [**MA COMMENT:** 1) It was more than popular belief that TINA, CAS, and other requirements created unnecessary business risks for commercial companies that could not or would not install compliance infrastructure (e.g., CAS-compliant cost accounting systems). There were findings rendered in this area not only by the Section 800 Panel but also by Congress after conducting several hearings. 2) Also, there is nothing to suggest that FASA made any such presumption. Techniques to establish the reasonableness of commercial prices existed long before FASA under TINA and CAS. The issue, which was well documented by Congress, was that the Federal Acquisition Regulations regarding obtaining information to justify price reasonableness implementing the law were onerous, outmoded, and obsolete. 3) Market forces have a bearing on commercial prices whether an offeror has a direct competitor or not; in FASA, Congress expressly acknowledged this (under the rationale, backed by real life experience, that a seller who operates under the belief that it could lose market share to a competing product or to a substitute technology, will price its products under the pressure of market forces, with or without an actual competitor on a

specific procurement). There is nothing to suggest that presumption is wrong today, especially if one does a proper market analysis. 4) The defense industry (and government contracting sector of the U.S. economy) does not somehow exist outside the U.S. free market system. "Commercial item" by definition, means it's sold or offered for sale in the non-government marketplace. "Where market forces are not active," the seller has a monopoly and there is no factual basis for asserting that monopolists dominate the government marketplace.]

Several other reforms over the past decade either complemented or served as a catalyst for FASA and FARA. In 1986, the Blue Ribbon Commission on Defense Management, chaired by former Deputy Secretary of Defense David Packard, highlighted the need for DoD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DoD contracts.[5]

In 1992, the Section 800 Panel, which was specifically focused on laws affecting defense procurement, published its 1800-page report that made recommendations in the areas of procurement reform, electronic commerce, and military specifications, among others.[6] The panel proposed a new approach to the acquisition of commercial items, both as end-items and as components in defense-unique products. The Panel specifically proposed: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; an expanded exemption for "adequate price competition" in the Truth in Negotiations Act and relief from inappropriate requirements for cost or pricing data when a competitively awarded contract for commercial items or services is modified; new exemptions to technical data requirements in commercial item acquisitions; and relief from "Buy American" restrictions. The Panel also proposed creation of new subpart in Title 10 for commercial item acquisitions providing for exemptions from statutes that create barriers to the use of commercial items and including provisions on pricing, documentation, and audit rights tailored for commercial item acquisition.

The Defense Science Board issued a report entitled "Defense Acquisition Reform" in July 1993. The report urged adoption of the recommendations of the Section 800 Panel. The Board also recommended: moving away from cost-based

[5] The President's Blue Ribbon Commission on Defense Management (The Packard Commission), A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: T he Packard Commission, June 1986).

[6] The Advisory Panel on Streamlining and Codifying Acquisition Laws (known as the Section 800 Panel) was created in response to Section 800 of the National Defense Authorization Act for Fiscal Year 1991, P.L. 105-510.

acquisition; using functional specifications to encourage commercial solutions; and adopting commercial practices for treatment of intellectual property.

Dr. William Perry served on the Packard Commission,[7] and he made implementation of its recommendations and those of the Section 800 Panel a high priority when he returned to the Pentagon in 1993 as Deputy Secretary of Defense and, in 1994, became Secretary. Toward that end, on February 24, 1994, he set forth his vision for simplification of the way the Pentagon buys military systems in a report titled "Acquisition Reform: A Mandate for Change."

On June 29, 1994, Dr. Perry issued a memorandum entitled "Specifications and Standards—A New Way of Doing Business." Also known as the "Perry Memo," it reversed DoD policy by directing the military services to "use performance and commercial specifications and standards instead of military specifications and standards, unless no practical alternative exists to meet the user's needs." It also directed military acquisition programs to reduce their oversight, employing process controls in place of extensive testing and inspection.

Around the same time, the manner in which the Department of Defense acquired information technology changed. The Information Technology Management Reform Act of 1996 (Division E of the Clinger-Cohen Act) sought to leverage commercial information technology advances by calling for "modular contracting" in which acquisitions are broken into flexible, evolutionary increments.[8]

Of course, even with the implementation of FASA, FARA, and related changes, the Government is not a commercial buyer. [**MA COMMENT**: No one would deny that the Government's mission is unique; however, the following discussion fails to show why that unique mission should from a policy perspective, lead to unique purchasing methods] What has been created is an artificial regulatory construct in which certain approaches labeled "commercial" are used to avoid the traditional cost-based regulatory burdens. The ways in which the Government differs from a commercial buyer are many. But, to take some obvious examples: [**MA COMMENT:** This entire discussion is based on a

[7] In 1985, the President established the Blue Ribbon Commission on Defense Management, which became known as the "Packard Commission." The commission recommended: (1) establishment of an Under Secretary of Defense for Acquisition, (2) establishment of a Service Acquisition Executive for each defense agency, and (3) appointment Program Executive Officers to manage a portfolio of major defense programs.
[8] *Id.* at 171.

false premise about what FASA intended to achieve, especially with respect to "artificial regulatory construct." FASA did not seek to make the Government buyer a commercial buyer. It did not seek to *avoid* traditional cost-based burdens. The comment mistakenly implies that commercial companies were subject to cost-based burdens in the first place. This discussion is irrelevant, and if it is to be included, it needs rewriting and belongs in the analysis section. Some suggested revisions follow but they do not resolve all our concerns if this discussion remains.]

- The Government dictates the terms of its contracts and establishes the remedies and punishments for breach of the terms of its own contracts. The only constraints on this power are the government's self-constraint and firms' refusal to do business on government terms.

- The Government is ***not accountable*** from a profit and loss standpoint for its performance. Success in Government is measured by different standards; *e.g.*, successful mission accomplishment, which features national security, defense, and homeland security missions. (Interestingly, DoD and DHS account for a very high percentage of purchases from the GSA Schedules, GWACs, and MACs.) Market-based pressures that strongly influence commercial company performance are not present. Private industry can change and adapt its practices to reflect current commercial practices and market trends as they evolve. The government changes its practices by statute and regulation. [**MA COMMENT**: The first sentence erroneously suggests that meeting budget and time constraints is of no importance to contracting officers. The implications of the parenthetical are murky at best. The final sentence is simply wrong. It wrongly posits that every aspect of government procurement must be dictated by statute or regulation. That is certainly untrue in the Federal system, e.g. FAR 1.102(d), and need not be true in any public procurement system. In fact the Government could give its buyers as much freedom to follow market changes as commercial firms have. It has chosen not to for many good reasons but not because it could not do so. Additionally, the reference to DoD and DHS is interesting, but has nothing to do with the subject at hand.]

- Government is committed to a host of social and economic programs that are largely implemented through discretionary expenditures divided between grants and the procurement system, such as diversity requirements or preferences for small and disadvantaged businesses of various types; environmentally friendly products; handicap accessible

products, services and buildings; domestic content preferences and many others. This means the Government may purchase services or goods from a more costly provider in furtherance of broader social policy goals. And, compliance with some of these requirements is subject to an audit and compliance regime by a variety of Federal agencies. [**MA COMMENT**: Socioeconomic requirements in government contracts are unrelated to the working group's recommendations; i.e., this difference doesn't matter with respect to the subject of this report.]

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  - The Government has its own regulatory intellectual property (IP) regime that is completely different from the private sector. The private sector focuses on development and protection of IP and has significant legal remedies for protecting the value of its IP. The Government, on the other hand, is focused on its rights to use IP without restriction for government purposes, which may involve giving a company's IP to a competitor, if necessary, for a government mission. [**MA COMMENT**: The government actually has conflicting goals for IP commercialization and unfettered government use. *DOD, Intellectual Property: Navigating Through Commercial Waters*, page 1-1 (October 15, 2001). The Constitution's direction to "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. Const., Article 1, Section 8, demonstrates that it is not government policy to use IP without restriction. Thus it is misleading to say the Government's IP regime is "completely different from the private sector." In fact, one could argue that it was just this sort of misperception that led DOD to issue its Guide, pages iii – iv. Additionally, the data rights regulations expressly acknowledge and permit the parties to develop specially negotiated data rights in commercially developed proprietary data exchanged in government contracts. Nowhere does it permit the Government to expropriate or misuse a company's IP for purposes for which the government has not negotiated.]

  - The private sector integrates its acquisition process and professionals into its business and values their contribution to the bottom line. However, in the Government, the contracting professionals are often separate from the user and not an integral part of the management team charged with achieving mission

success. [**MA COMMENT**: It is not an inherent difference between commercial and government businesses nor is it true all commercial businesses integrate their acquisition professionals. In fact, the Panel should advocate the Government integrate the acquisition professionals more into the agency mission oriented functions.]

- The disputes mechanism for government contractor who have disagreements with their customer over performance, IP rights, pricing, or terms is limited to a narrow range of remedies under the Contract Disputes Act. In the private sector, parties are free to bring claims in court or negotiate contract provisions for alternative resolution. [**MA COMMENT**: Dispute mechanisms are not significantly different. Commercial buyers and government agencies both use ADR and attempt to negotiate venue, jurisdiction and applicable law for suits brought under contracts. The chief difference is that a seller under a Government contract is obligated to continue performance in the face of a significant contract dispute. The Contract Disputes Act only applies when the government agency personnel and the contractor personnel cannot agree on any other resolution just as in the private sector.]

- Even in the "commercial" area, the Government has the right to audit, investigate, and bring civil or criminal fraud claims against a contractor, even for disagreements over performance or interpretation of contract terms. [**MA COMMENT**: This is true but only because statutes so provide. A public procurement system does not necessarily need audit rights or unique criminal enforcement mechanisms.]

It is in the context of the changes creating commercial practices in Government that the Panel's Commercial Practices Working Group has done its analysis. The Working Group began its efforts by reviewing relevant laws, regulations, and procurement policies relating to use of commercial practices by the Government. It further identified and reviewed reports and studies from the Government Accountability Office ("GAO"), the Inspectors General of DoD and GSA, and examined the work product from other studies and analyses such as the Defense Acquisition Performance Assessment and the study of Price-Based Acquisition performed by the Rand Corporation for the Air Force. The Working Group also has examined other literature and studies on the topic of commercial practices in services acquisition. The Working Group has attempted to seek the views of all stakeholders; *i.e.*, the government users and buyers, the holders of

government contracting vehicles, and the contractor community. Perhaps most importantly, the Working Group and the Panel have attempted to ascertain ***current*** commercial practices, particularly for services acquisition from large commercial buyers of services and the professionals that support the procurement process for those companies. [**MA COMMENT:** The CPWG should provide a bibliography of the literature and studies it relied upon for this point.]

The Working Group and the Panel gained a heightened awareness that there exists in the private sector a large, vigorous, and rapidly-growing market for the acquisition of professional services, particularly information technology ("IT"), and IT-heavy business management and financial services. When large, private-sector companies acquire such services, they refer to the transactions where a vendor is engaged to, for example, manage a company's IT resources or its HR department, or support financial institutions transaction processes, as "outsourcing." American corporations are hiring services vendors, both domestic and foreign, at a rapid pace to drive down costs and improve their profitability. These companies are supported, both internally and externally, in their procurement processes by highly trained and experienced executives and consultants. Indeed, there are services acquisition specialists who work only in the private sector. Moreover, major private-sector buyers are acquiring services from many of the companies who sell services to government agencies (albeit, perhaps, from the government division). The Working Group and the Panel set out to learn as much as possible about the acquisition processes used by large private sector buyers. The Working Group has met over 25 times in the past 11 months. The full Panel also has heard directly from a number of private sector buyers about their acquisition practices.

The questions upon which the Working Group has focused include: (1) how the Government can take advantage of commercial practices; (2) looking at the existing government "commercial" framework, what is working and what is not, and what has been left behind by the commercial market; (3) how the Government's commercial-like practices can be refined and improved by reference to current commercial best practices; and (4) recognizing that the Government will never be a truly commercial buyer, striking the right balance to obtain mission performance, honor various social policy goals, obtain a reasonable level of oversight to protect the Government from fraud and abuse. These are significant questions to have tackled within the short duration of the Panel's existence, and the expectation is that this debate will continue for some time. However, it is very useful to benchmark current commercial best practices based on the huge volume of private sector services transactions rather than

assume that the assumptions about commerciality in government put in place 10 years ago are immutable.

B. "Commercial Items": Definition and Procurement Policies

The term "commercial items" has evolved as various acquisition reforms have attempted to simplify government procurement and to harness the efficiency of the commercial marketplace. As the Section 800 Acquisition Advisory Panel observed, "[T]he primary purpose of defining a commercial item [is] to be able to exempt items so defined from the reach of [statutes and regulations that] have created barriers to the acquisition of commercial items."[9] Accordingly, this categorical approach to procurement consists of four components: (1) the gateway definition of "commercial items;" (2) the application of the definition to a particular item or service; (3) the determination of the appropriate pricing mechanism; and (4) the preferences and exemptions afforded to such items as qualified supplies or services.

1. Statutory Definition: "Commercial Items"

The current statutory definition for "commercial items" is set out in the Office of Federal Procurement Policy Act[10]—and it is quite broad. It includes tangible items of the type traditionally used by the public, but it also includes items that have evolved from tangible commercial items and items that have been modified through processes traditionally available to the general public or in such a way that does not significantly alter the nongovernmental function of the item. Notwithstanding the use of the term "items," the definition also embraces two forms of services: (1) services in support of tangible, commercial items and (2) standalone services, provided that such services are offered and sold competitively in substantial quantities based on established catalog or market prices. In full, the current statutory definition provides: [**MA COMMENT:** The definition, as compared to definitions that existed prior to FASA, is broader in some respects and narrower in others. In other cases, the definition was simply catching up with evolving practices, such as licenses and leases. The point is the draft ought to address whether the definition achieves the purposes set by Congress; not whether it is broad or narrow.]

[9] 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 18 (1993).
[10] 41 U.S.C. § 403(12).

The term "commercial item" means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public; or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—

(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.[11]

2. *Statutory Preferences and Exemptions for "Commercial Items"*[12]

Beginning with FASA[13] in 1994, Congress established a preference for the acquisition of "commercial items"[14] and provided exemptions from many of the cost-based procurement requirements, including the Truth in Negotiation Act's ("TINA") cost or pricing data requirements[15] and certain cost accounting standards ("CAS").[16] In addition, Congress provided exemptions from many

[11] 41 U.S.C. § 403.
[12] See Appendix xxx for a redline tracing the evolution in the definition of "Commercial Items."
[13] Pub. L. No. 103-355, 108 Stat. 3243 (1994).
[14] 10 U.S.C. § 2377 (codifying preferences).
[15] 10 U.S.C. § 2306a(b)(1)(B).
[16] 41 U.S.C. § 422(f)(2)(B)(i).

government-unique laws that served as barriers to the procurement of "commercial items."[17] [**MA COMMENT:** FASA did not create exceptions/exemptions (hereafter grouped as exemptions) for TINA and CAS. This misconception creates problems throughout the draft. Commercial item exemptions already existed for contracts awarded on the basis of catalog or market prices of commercial items sold in substantial quantities to the general public. The well-documented problem at the time was that the regulations applying the concepts of catalog or market prices were outmoded and obsolete. FASA accepted this and created an *additional* TINA and CAS exemption for commercial items. This was regarded as an "if all else fails exemption" when the catalog or market price exemption did not work. However, it proved to be unworkable, mostly because of the attendant postaward audit rights, and was later scrapped under FARA in favor of a single exemption for contracts for commercial items.]

One result has been the increased use of the General Service Administration's ("GSA") supply schedules, which make available, on a continuous basis, supplies and services at pre-negotiated, maximum-rates.[18] Users of the schedules are encouraged to negotiate lower prices based on their specific requirements. In a report released in 2000, the General Accounting Office ("GAO") explained, "Use of GSA federal supply schedules has grown from $4.5 billion in 1993 to $10.5 billion in 1999."[19] The effect on the acquisition of services was particularly profound. FASA led to a "significant increase" in the number of services available on GSA's schedules,[20] and by 2001, the Federal Government spent $109 billion on services, constituting 51 percent of all acquisition spending for that year.[21] In fiscal year (FY) 2004, total GSA schedule sales had increased to $31.1 billion with services constituting 59.5% of Schedule sales or $18.5 billion. In FY 05, GSA schedule sales increased again to a total of

[17] *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8105, 108 Stat. 3243, 3392 (1994). *See also* Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, div. D, tit. XLII, § 4203, 110 Stat. 642, 654-54 (1996) (rendering inapplicable certain procurement laws regarding commercially available off-the-shelf items). The Federal Acquisition Reform Act was renamed the "Clinger-Cohen Act" by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).

[18] *See* GENERAL ACCOUNTING OFFICE, FEDERAL ACQUISITION: TRENDS, REFORMS, AND CHALLENGES, GAO/T-OCG-00-7, at 6-7 (Mar. 2000).[**MA COMMENT**: There is nothing in this GAO Report that suggests that FASA caused the increase in GSA schedule usage. The GAO report stated, "we reported that it was difficult to measure any increase in the government's purchases of commercial items since the 1994 acquisition streamlining act because reliable baseline data were not available."]

[19] *Id.* at 7.

[20] *See* COMMERCIAL ACTIVITIES PANEL, FINAL REPORT: IMPROVING THE SOURCING DECISION OF THE FEDERAL GOVERNMENT 29 (Apr. 2002), *available at* http://www.gao.gov/a76panel/dcap0201.pdf.

[21] *Id.* at 27.

$33.9 billion with services constituting 61.9% or $20.9 billion. During the past eight years, GSA-managed schedule sales have grown on average 25.6 percent annually. (Note that for FY 2005 GSA-managed Schedule sales grew by only 9 percent from FY 2004 – a decrease from the 21.5 percent growth in the prior year.)[22] [**MA COMMENT:** This is a dubious cause and effect. Many attribute the growth in the MAS program to the Government's greater demand for services, particularly as it outsourced support functions and cut employees. GSA implementation of FASA & FARA, which came well after the FAR implementation, was widely criticized as being inconsistent with FASA & FARA. Also, some see the growth in MAS contracts for services as caused by a reduction in the acquisition workforce in particular. The structure of MAS contracts would be more appealing to the fewer procurement professionals available to conduct the Government's business. However, the recent growth in other interagency ID/IQ ordering contracts (e.g., GWACS) might suggest that procurement professionals find the MAS program to be less attractive relative to alternative vehicles. Conditions that contribute to that perception include: increased audit scrutiny, lengthened procurement cycles, inconsistent interpretation of DoD directives and poor perception of GSA assisted–services. Reportedly, there will be a significant drop in MAS sales in FY 2006.]

C. Legislative and Regulatory Origins [**MA COMMENT:** Much of this discussion is not relevant to the stated issues being reviewed by the Panel.]

To fully understand the contemporary usage of the term "commercial items," it is necessary to consider its origins—as a component of the larger development of modern acquisition policy and as a reaction to perceived problems associated with those policies. In setting the stage, three principal goals driving acquisition policy should be kept in mind: (1) the need for effective competition so that the Government receives quality goods and services at a fair price; (2) the need to provide transparency into the government's acquisition system; and (3) the need to ensure that the Government's acquisition has and is seen as having integrity. [**MA COMMENT**: We suggest that "perceived" in the first sentence is objectionable since acquisition reform addressed real problems. We also suggest the following rewrite to better state the points: In setting the stage, three principal goals driving acquisition policy should be kept in mind: (1) the need for the Government to receive quality goods and services at a fair price; (2) the need to provide transparency into the government's acquisition system; and (3) the need to ensure that the Government's acquisition has and is seen as having integrity. Competition has been one of the most effective tools in

[22] Source GSA Provided Data.

achieving these three goals. *See also the competition principal adopted by the American Bar Association.*]

1. The Origins of Federal Acquisition Law

The Federal Government has been acquiring private goods and services since the dawn of the Republic when the Continental Congress established the first Commissary General during the Revolutionary War.[23] In many respects, government procurement policy has continued to reflect the same considerations that the Commissary General faced—the need to maximize competition, obtain reasonable prices, and assure accountability of public procurement officers.[24] It was not until quite recently, however, that the Government began to adopt a systemic approach for procurement—by consolidating acquisition regulations and promoting the use of more business-like procedures.

The start of the modern acquisition era is appropriately demarcated by the end of the Second World War.[25] In the immediate aftermath, Congress enacted the framework for modern acquisition procedures: the Armed Services Procurement Act of 1947[26] and its civilian counterpart, the Federal Property and Administrative Services Act of 1949.[27] For the most part, federal acquisition policy developed from this framework—though it was shaped, to a great extent, by the unique concerns of the second half of the twentieth century, including the large peacetime military establishments associated with the Cold War, the Federal Government's expanding role in the domestic sphere, the rapid development of civilian and military technologies, and the equally rapid expansion of government spending.[28]

As the Government sought to acquire more services and supplies—in particular, the newly emerging aerospace and electronic technologies of the 1950s and 1960s—the procurement system became exponentially more complex.[29] These trends proved prohibitive to achieving the Government's

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[23] 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 163 (1972).
[24] S. REP. NO. 103-259, at 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2598.
[25] It appears that the stresses of war are equally beneficial for the advancement of federal procurement policies as they are for medicine. As the 1972 Commission on Government Procurement explained, "The most significant developments in procurement procedures and policies have occurred during and soon after periods of large-scale military activity." 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 163 (1972).
[26] Pub. L. No. 80-413, 62 Stat. 21 (1947) (codified as amended at 10 U.S.C. § 2301 *et seq.*).
[27] Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended at 40 U.S.C. § 471 *et seq.*).
[28] S. REP. NO. 103-259, at 1-2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2598.
[29] 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 177-78 (1972).

principal goals outlined above: the complexity discouraged competitive participants, while the volume of negotiated acquisitions made it increasingly difficult for the Government to safeguard itself against inflated cost estimates in negotiated contracts.[30]

2. The Commercial Item Exemption from the Original Truth in Negotiations Act

In 1962, Congress enacted Public Law 87-653 to facilitate fair price terms in noncompetitive contracts.[31] The law amended the Armed Services Procurement Act to require "oral or written discussions" with all firms "within a competitive range" and promoted the use of advertising over single-party negotiated contracts—all in an effort to increase competition. The law also contained a provision requiring contractors to submit and certify detailed cost or pricing data to provide the Government with sufficient information to negotiate a fair price—now popularly referred to as the Truth in Negotiations Act ("TINA").[32] [**MA COMMENT**: Both controlling statutes, 10 USC §2304(a) (1964) and 41 USC § 252(c) (1964), (passed in the late 1940s) preferred formal advertising over negotiation. Negotiation included both sole source and competitively negotiated contracts. See Nash & Cibinic, Federal Procurement Law, 274-75 (2nd Ed. 1969). TINA did not make the changes described.]

TINA exempted certain acquisitions from its cost or pricing data requirements, including acquisitions that involved "commercial items sold in substantial quantities to the general public." In full, the exemption clause stated:

> *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection

[30] *Id.* at 178. *See also* S. REP. NO. 87-1884 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476.
[31] S. REP. NO. 87-1884 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476.
[32] Ironically, Public Law 87-653 may have actually discouraged increased participation and competition among vendors. The 1993 Report of the Acquisition Law Advisory Panel ("Section 800 Panel") argued that TINA "greatly impedes commercial buying." 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 6 (1993).

> may be waived and states in writing his reasons for such a determination.[33]

TINA was the first statute to use the term "commercial items," but it defined that term in a narrow fashion. To qualify under the "commercial item" exemption—and avoid TINA's data submission requirements—a contractor had to proffer established catalog or market prices "*sold in substantial quantities to the general public.*" The definition did not encompass modification or development, and it did not apply to items not yet sold to the general public, even if those items were being developed for use by the general public. [**MA COMMENT:** While TINA did not define "commercial item" as the discussion states, a provision in the then-existing acquisition regulation, ASPR 3-807.1(b)(2)(ii), defined "Commercial items" as including services. This is another significant fact undercutting the Working Group's discussion in a variety of places. TINA deserves a much more thorough and accurate presentation. In reality, Congress left it to the regulations to define commercial item, which they did, and Congress later concluded that the regulations made matters worse or at best had become obsolete. Also, commercial item was an exception not an exemption, and it was not intended to *avoid* TINA's data submission requirements. Data still had to be submitted, and FASA and FARA made that requirement clearer.]

3. The Commission on Government Procurement

During the 1960s and 1970s, the federal acquisition system was perceived as being plagued by cost overruns, inefficiencies, and burdensome government specifications. A 1970 General Accounting Office study of 57 major Department of Defense ("DoD") systems found 38 systems with at least a 30 percent cost increase from the point of contract award.[34] Although this percentage was historically consistent with past cost overruns, the sheer volume of government contracting yielded staggering dollar amounts that proved unpalatable.[35] Government-unique specifications also proved a major impediment to the efficient procurement of otherwise suitable, commercially developed products and services. By way of illustration, the military specifications for fruitcake once ran eighteen pages.[36]

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[33] Pub. L. No. 87-653, 76 Stat. 528 (1962) (emphasis in original).
[34] *[Cite to GAO Report as well.]* 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 182 (1972).
[35] *Id.*
[36] Stephen Barr, *'Reinvent' Government Cautiously, Study Urges*, WASH. POST, July 28, 1993, at A17. Of course, that should be understood in the context that the Government buys fruitcakes by the truckload (quite different from the "Joy of Cooking" recipe identified in the article).

In 1969, Congress established the Commission on Government Procurement to study and recommend to Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch.[37] The Commission's authority subsequently was extended,[38] and in 1972 it issued its report to Congress. Among its many recommendations, the Commission advocated for the creation of the Office of Federal Procurement Policy and the consolidation of federal acquisition regulations, leading to the passage of the Office of Federal Procurement Policy Act of 1974 and, ultimately, the promulgation of the Federal Acquisition Regulation ("FAR").[39]

The idea that the Federal Government could benefit from the broader use of commercial items did not go unnoticed by the Commission in its 1972 Report. In fact, the Commission urged Congress to promote the acquisition of commercial products over "Government-designed items to avoid the high cost of developing unique products."[40] This recommendation, however, did not lead to appreciable statutory reforms—at least, not in the 1970s.

4. DoD Directive 5000.37

In 1978, the DoD issued its Acquisition and Distribution of Commercial Products ("ADCOP") directive, "which sought to facilitate the acquisition of commercial products by eliminating Government specifications and contract clauses that did not reflect commercial practices."[41] During its implementation of ADCOP, DoD sought "to establish qualified commercial product lists," but "[t]his aspect of ADCOP was blocked by Congress because it would have precluded small businesses that sold only to DoD from continuing to sell their products as commercial products."[42] At the same time, "various elements within DoD began assessing how commercial and foreign subsystems and components might be used in weapons systems."[43]

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[37] Pub. L. No. 91-129, 83 Stat. 263 (1969).
[38] Pub. L. No. 92-47, 85 Stat. 102 (1971).
[39] Pub. L. No. 93-400, 88 Stat. 796 (1974).
[40] 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 3 (1993) (citing 3 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Part D (1972)).
[41] *Id.* (citing DoD Directive 5000.37 (Sept. 29, 1978)).
[42] *Id.* at 3 n.6 (citing W.T. Kirby, *Expanding the Use of Commercial Products and "Commercial-Style" Acquisition Techniques in Defense Procurement: A Proposed Legal Framework*, *in* PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, FINAL REPORT: A QUEST FOR EXCELLENCE (1986)).
[43] *Id.* at 3.

5. 1984 Congressional Reforms

In 1984, Congress passed the Competition in Contracting Act ("CICA"),[44] which was designed "to establish a statutory preference for the use of competitive procedures in awarding federal contracts for property or services, to impose restrictions on the awarding of noncompetitive contracts, and to permit federal agencies to use the competitive method most conducive to the conditions of the contract."[45] In addition to representing the first major amendments to the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, CICA contained a specific provision requiring federal agencies to "promote the use of commercial products whenever practicable."[46] CICA also provided a statutory basis for multiple award schedule contracting, which became "a primary method for Government purchase of commercial products."[47] CICA deemed the GSA Schedules to meet the definition of "competitive procedures" provided that (1) participation in the program is open to all responsible sources, and (2) orders and contracts under the schedules result in the lowest overall cost alternative to meet the Government's needs.[48]

Following the passage of CICA, Congress enacted the Defense Procurement Reform Act as a component of the National Defense Authorization Act for Fiscal Year 1985.[49] The act was designed to curb abuses, recently brought to light, regarding the acquisition of military parts and supplies.[50] For example, during the course of congressional investigations, the House Committee on Armed Services discovered an Air Force report that attempted to explain "how a diode which cost a contractor $0.04 was billed to the Government at $110.34."[51] [**MA COMMENT**: While this example is hyperbolic, several factors contribute to increased costs for the Government. They include: government accounting rules on application of overhead costs, QA requirements, military-unique specifications, government packaging, shipping, invoicing, paperwork, etc.] In an effort to reduce these excessive payments, Congress directed DoD to use "standard or commercial parts . . . whenever such use is technically acceptable and cost effective."[52]

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[44] Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1175 (1984).
[45] S. REP. NO. 98-50, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2174.
[46] Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1186 (1984).
[47] 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 3 (1993).
[48] 41 U.S.C. § 259.
[49] Pub. L. No. 98-525, tit. XII, 98 Stat. 2492, 2588 (1984).
[50] *See id.*
[51] H.R. REP. NO. 98-690, at 10 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4237, 4241.
[52] Pub. L. No. 98-525, tit. XII, § 1202, 98 Stat. 2492, 2588-89 (1984).

6. The President's Blue Ribbon Commission on Defense Management

In 1986, President Reagan established a Blue Ribbon Commission ("Packard Commission") to make recommendations to improve defense management.[53] As the 1993 Acquisition Advisory Panel later explained, the Packard Commission emphasized that, by using commercial items, DoD could expect "lower costs and shorter lead times in fielding new products and systems."[54] The Packard Commission's Report argued:

> Rather than relying on excessively rigid military specifications, DoD should make greater use of components, systems, and services available "off-the-shelf." It should develop new or custom-made items only when it has been established that those readily available are clearly *inadequate* to meet military requirements.[55]

The Packard Commission contended that, no matter how DoD improved its organization or procedures, the acquisition system could not compete with the commercial marketplace.[56] The Department simply could not duplicate the economies of scale, or the efficiency and innovation, associated with the free market system.[57] Moreover, given the extensive testing and documentation that the Department demanded, the military's technology often lagged substantially behind the technology available in the commercial marketplace.[58]

7. Congressional Directives of the Late 1980s and Early 1990s

Shortly after the Packard Commission issued its final report in 1986, Congress amended Title 10 of the United States Code to add a provision mandating that DoD use "nondevelopmental items" where those items would meet DoD's needs.[59] The act defined "nondevelopmental items" to include "any

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[53] PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, FINAL REPORT: A QUEST FOR EXCELLENCE (1986) [hereinafter PACKARD COMMISSION REPORT], *available at* http://www.ndu.edu/library/pbrc/36ex2.pdf.
[54] 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 3 (1993).
[55] PACKARD COMMISSION REPORT, *supra* note 53, at 60 (emphasis removed).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 907, 100 Stat. 3816, 3917 (1986).

item of supply that is available in the commercial marketplace."[60] The provision also required DoD to define its requirements and undertake research to determine "whether nondevelopmental items are available or could be modified to meet agency needs" before creating unique military specifications.[61] According to a committee report that accompanied this legislation, it was Congress's intent to break DoD's "long-standing bias to use military specifications."[62]

Based on concerns over DoD's "lack of progress in eliminating barriers to the procurement of [nondevelopmental items],"[63] in 1989 Congress issued another set of directives—this time requiring DoD to issue streamlined regulations governing the acquisition of nondevelopmental and commercial items.[64] These mandates—part of the Defense Authorization Act for Fiscal Years 1990 and 1991—also required DoD to lessen TINA's cost or pricing data submission requirements.[65] However, Congress failed to amend TINA's statutorily defined exemptions, making it difficult for DoD to provide relief through regulatory changes.[66] Finally, in 1990, Congress again directed DoD to prioritize the use of nondevelopmental items.[67] [**MA COMMENT:** This paragraph is an inaccurate description of the events. Congress told DoD to fix the regulations because the regulations were considered to be at the root of the TINA problem on contracts for commercial items. See Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, "DoD's Inadequate Use of Off-the-Shelf Items," Senate Report No. 101-62 (October 30, 1989): "The Department of Defense regulations implementing the Truth in Negotiations Act require contractors to submit certified cost or pricing data in cases where the Government's interest is adequately protected by prices that have been tested in the marketplace." There was no need for Congress to amend TINA's statutorily defined exemptions. Also, it should be observed that DoD failed to follow Congress' direction, a failure that Congress later commented upon. See House of Representatives Conference Report No. 103-712, 103rd Congress, 2nd Session (August 21, 1994), page 186: "The conferees note that section 824 of the National Defense Authorization Act for Fiscal Year 1990 required the Secretary of Defense to revise the regulations governing the

[60] *Id.*
[61] *Id.*
[62] S. REP. NO. 99-331, at 265 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6460.
[63] H.R. CONF. REP. NO. 101-331, at 612 (1989), *reprinted in* 1989 U.S.C.C.A.N. 977, 1069.
[64] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b), 103 Stat. 1352, 1504-05 (1989).
[65] *Id.*
[66] *See id.*
[67] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 814, 104 Stat. 1485, 1595 (1990).

applicability of the catalog or market pricing exception, but no later than August 1991, to make it easier for commercial items to qualify for the exception. Despite the clear statutory directive, this provision has yet to be implemented by the Department of Defense."]

8. DFARS Parts 210 and 211

In response to these congressional directives, DoD promulgated Parts 210 and 211 of the Defense Federal Acquisition Regulation Supplement ("DFARS") in 1991.[68] Part 210 offered a definition and a preference for "nondevelopmental items,"[69] while Part 211 contained an early predecessor to the modern statutory definition of "commercial items."[70] In pertinent part, the definition in Part 211 provided:

> (a) Commercial items means items regularly used in the course of normal business operations for other than Government purposes which:
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> (1) Have been sold or licensed to the general public;
>
> (2) Have not been sold or licensed, but have been offered for sale or license to the general public;
>
> (3) Are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time;
>
> (4) Are described in paragraph (1), (2), or (3) that would require only minor modification in order to meet the requirements of the procuring agency.[71]

The DFARS' definition represented a significant departure from TINA's circumscribed conception of a commercial item. In contrast to TINA, which required that commercial items be "sold in substantial quantities to the general public,"[72] Part 211 included items that were merely been "*offered* for sale or license to the general public" and items that *eventually* would "be available for commercial delivery."[73] In addition, Part 211 contained a general provision,

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[68] 56 Fed. Reg. 36,315, 36,315-17 (July 31, 1991) (codified at 48 C.F.R. pts. 210, 211).
[69] *Id.* at 36,315 (defining "nondevelopmental items").
[70] *Compare* 56 Fed. Reg. 36,317 (July 31, 1991) (defining "commercial items"), *with* 41 U.S.C. § 403(12) (2000) (defining "commercial items"), *and* 48 C.F.R. § 2.101 (2004) (also defining "commercial items").
[71] 56 Fed. Reg. 36,317 (July 31, 1991) (codified at 48 C.F.R. pt. 211).
[72] Pub. L. No. 87-653, 76 Stat. 528 (1962).
[73] 56 Fed. Reg. 36,317 (July 31, 1991) (codified at 48 C.F.R. pt. 211) (emphasis added).

which permitted an item to still qualify as a "commercial item" even if it required "minor modification in order to meet the requirements of the procuring agency."[74]

9. The Section 800 Acquisition Advisory Panel

Sensing the need for significant acquisition reform, in 1990, Congress established the Advisory Panel on Streamlining and Codifying Acquisition Laws ("Section 800 Panel").[75] The Section 800 Panel—popularly named after the section of the Act from which it derived authority—was to review existing defense acquisition laws, make recommendations for their repeal or revision, and prepare an acquisition code "with a view towards streamlining the defense acquisition process."[76]

In January of 1993, the Panel issued its final report to Congress. Among its many recommendations, the Panel proposed "a comprehensive new approach to address the acquisition of commercial items."[77] After explaining that the patch-work of congressional directives had failed to promote the broad use of commercial items in DoD systems, the Panel identified several reasons for this shortfall, including (1) the failure to enact a uniform definition for commercial items, (2) the burdens imposed by TINA's cost or pricing data requirements, (3) the arduous standards associated with unique socioeconomic laws applicable only to government contractors, and (4) the ever-increasing burdens that flowed from the myriad federal statutes and regulations governing procurement.[78] [**MA COMMENT:** As the following rewrite demonstrates, the draft inaccurately summarizes key Panel findings including the significant omission of inhibiting audit requirements. "After explaining that the patch-work of congressional directives had failed to achieve the broad use of commercial items in DoD systems, the Panel identified several reasons for this shortfall, including (1) the failure to enact a uniform definition for commercial items, (2) TINA's requirements "greatly impedes commercial buying", (3) the unique Government standards including socioeconomic laws, trade restrictions, procurement integrity, costing and audit, and (4) the ever-increasing burdens that flowed from the myriad federal statutes and regulations governing procurement."]

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[74] *Id.*
[75] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).
[76] *Id.*
[77] 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 1 (1993).
[78] *Id.* at 5-6.

Drawing largely on Part 211 of the Defense Federal Acquisition Regulation Supplement,[79] the Panel proposed a uniform statutory definition for "commercial items"—

> (5) The term "commercial item" means
>
> (A) property, other than real property, which: (i) is sold or licensed to the general public for other than Government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than Government purposes; or (iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;
>
> (B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the Government and commercial services are or will be provided by the same workforce, plant, or equipment;
>
> (C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B) if unmodified will be deemed to be a commercial item when modified for sale to the Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

[79] *See id.* at 1, 17-18.

> (D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than "commercial" merely because sales of such item to the general public for other than Governmental use are a small portion of total sales of that item; and
>
> (E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.[80]

"The Panel believed that the primary purpose of defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations that have created barriers to the acquisition of commercial items."[81] To further this end and to eliminate many of the shortfalls identified above, the Panel expanded Part 211's definition to include items that were modified in a way "customarily provided in the commercial marketplace" or in a manner that "would not significantly alter the inherent nongovernmental function or purpose of the item."[82] More fundamentally, the definition was expanded to include "services," provided that those services were acquired in support of tangible commercial items.[83] The Panel tied its definition of services to a requirement that they be offered contemporaneously to the general public under similar terms and conditions and that the commercial and government services be provided by the same workforce, plant, or equipment. The Panel thus wanted to be sure that the services had a solid anchor in the commercial marketplace. However, the Panel did not include standalone, or "pure," services within the definition of a commercial item[84] [**MA COMMENT:** The Panel also

[80] *Id.* at 17-18.
[81] *Id.* at 18. [**MA COMMENT**: Quote significantly omits next sentence]
[82] *Id.*
[83] *Id.* at 17.
[84] *Id.* at 19. The Panel concluded that "it did not have sufficient information to recommend exempting 'pure' service contractors from additional Government-specific statutes and regulations." *Id.* This would have been the natural effect of including "pure services" within the definition of a commercial item. [**MA COMMENT:** This important matter should not be relegated to a footnote. The Panel was very

said that it made no sense to provide a means to the Government for buying commercial items of supply without also furnishing the means for buying ancillary services. See also comment on Footnote 84.]

10. The Federal Acquisition Streamlining Act of 1994

Over the course of the 103rd Congress, various legislative proposals were offered in an effort to implement the Section 800 Panel's recommendations.[85] Eventually, these efforts yielded the Federal Acquisition Streamlining Act ("FASA") of 1994[86]—ushering in the largest federal procurement changes in almost a decade. [**MA COMMENT:** FASA actually evolved from prior Congressional sessions, too.]

FASA included an expansive, uniform statutory definition for "commercial items," mostly tracking the Section 800 Panel's recommendations.[87] The definition did contain one significant revision, which was offered by the House of Representatives and acquiesced to by the Senate; it included standalone services within the meaning of "commercial items."[88] Accordingly, while the Section 800 Panel and the Senate would have included only "services that are procured for support of a commercial item,"[89] the House of Representatives prevailed in including within the meaning of "commercial items" any service that is "offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions."[90] The definition, which remains in the current statute, ties the definition of commercial services to the sale of services by competitive sales in the commercial marketplace. Thus, it links together the definition of commercial item for services with an explicit requirement for validation through competitive sales in

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clear that they were not making any judgment on the propriety of including such services, nearly the opposite of what the current draft implies.]

[85] *See* Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (as introduced); Federal Acquisition Improvement Act of 1993, H.R. 2238, 103rd Cong. (1993); Federal Acquisition Reform Act of 1994, H.R. 4328, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1994, S. 2206, 103rd Cong. (1994); Federal Acquisition Streamlining Reform Act of 1994, S. 2207, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (enacted). *Cf.* Nondevelopmental Items Acquisition Act of 1991, S. 260, 102nd Cong. (1991); Federal Property and Administrative Services Authorization Act of 1991, H.R. 3161, 102nd Cong. (1991).

[86] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[87] *Id.* § 8001(a), 108 Stat. at 3384.

[88] H.R. CONF. REP. NO. 103-712, at 228-29 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2607, 2658-59.

[89] *Id.* at 228, 1994 U.S.C.C.A.N. at 2658. *Cf.* 8 REPORT OF THE ACQUISITION ADVISORY PANEL TO THE UNITED STATES CONGRESS 19 (1993).

[90] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (1994) (adding 41 U.S.C. § 403(12)).

the commercial market. [**MA COMMENT:** A case can be made that this was unintended or, at the least, badly coordinated. While the definition at FASA's Section 8001 refers to services offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog prices (FARA later added market prices), such concepts were eliminated from TINA and CAS. That is, while Congress was removing such provisions, it was also adding such provisions. This is an example of where Section 1 would be better served by having some balance because this has been a major and well-documented problem for industry.]

After defining "commercial items," Congress gave a strong preference for their acquisition[91] and provided streamlined mechanisms to eliminate barriers to their procurement.[92] Likewise, by expanding the definition of "commercial items," Congress seemingly expanded the applicability of the exemption from TINA's cost or pricing data requirements.[93] Two years later, Congress would eliminate all cost or pricing data reporting requirements for commercial item contracts.[94] [**MA COMMENT:** As previously indicated in our comments on page 18, this observation is misleading and wrong.]

11. The Regulatory and Practical Implementation of FASA

Following the passage of FASA, the Executive Branch began the difficult task of implementing its statutory requirements.[95] On September 18, 1995, DoD, GSA, and NASA issued a final rule, which included a regulatory definition for "commercial items."[96] For the most part, this definition tracked the definition in FASA—though it did little to clarify some of its more archaic terms.[97] The definition did seek to clarify what would qualify as permissible "minor modifications" by providing specific factors that could be used to adjudge the

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[91] *Id.* tit. VIII, § 8104, 108 Stat. at 3390 (adding 10 U.S.C. § 2377).
[92] *Id.* tit. VIII, § 8105, 108 Stat. at 3392 (eliminating various legal requirements imposed by Title 10 of the U.S. Code).
[93] *See supra* text accompanying note 31.
[94] *See* Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).
[95] For an overview of FASA's implementation, see GENERAL ACCOUNTING OFFICE, ACQUISITION REFORM: REGULATORY IMPLEMENTATION OF THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994, GAO/NSIAD 96-139 (June 1996).
[96] Federal Acquisition Regulation, Acquisition of Commercial Items, 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).
[97] *Compare* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (1994) (defining "commercial items"), *with* Federal Acquisition Regulation, Acquisition of Commercial Items, 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995) (also defining "commercial items"). Among the terms that the implementing agencies failed to clarify were "established catalog and market prices." *See* 60 Fed. Reg. at 48,235.

nature of those modifications.[98] The regulatory definition also refined the scope of standalone services, permitting qualification based on established "market prices" (a term that was not included in the statutory definition), but it prohibited the acquisition of standalone services on an hourly basis if there was no established catalog or market price.[99] [**MA COMMENT:** DoD correctly surmised that not including "market prices" was a mistake, which Congress corrected under FARA. The final rule was issued in anticipation of the correction. Section 1 fails to mention that proposed rules were issued in early 1995 and that the Government's proposed implementation of the TINA provisions drew sharp criticism from both industry and Congress. In fact, Congress observed that the proposed TINA regulations were worse than before. See House Committee on National Security, National Defense Authorization Act for Fiscal Year 1996, House of Representatives Report No. 104-131, (June 1, 1995):"Finally, in the third category [proposed regulations which not only ignore the letter and spirit of FASA but also impose new burdens not required by statute], the proposed regulations related to ... TINA appear to miss the opportunity to take advantage of the legislative authority to eliminate regulatory-based burdens ..." This caused significant revisions to the promulgated regulation, including creating the "preference in determining the type of information required" at FAR 15.402 that has been the target of recent criticism expressed by certain Panel members.]

As a practical matter, FASA enabled GSA to expand its supply schedule programs, thus facilitating the acquisition of a greater number of supplies and services on a pre-negotiated, fixed-price basis.[100] In a report released in 2000, the GAO explained that the use of federal supply schedules more than doubled over the six-year period from 1993 to 1999.[101] Over this same time frame, the outlays for procured services government-wide overtook the outlays for procured supplies—totaling $109 billion in 2001.[102] As noted above, by FY 2005, total GSA Schedule Sales had increased to $33.9 billion with services constituting 61.9% of total sales, or $20.9 billion. [**MA COMMENT:** Section 1 overstates FASA's impact on the MAS program. See previous comment in text at pages 13, 14, & 15.]

Although it is believed that sales of services under other government-wide vehicles also have increased dramatically (as discussed elsewhere in this

[98] 60 Fed. Reg. at 48,235.
[99] *Id.*
[100] *See* GENERAL ACCOUNTING OFFICE, FEDERAL ACQUISITION: TRENDS, REFORMS, AND CHALLENGES, GAO/T-OCG-00-7, at 6-7 (Mar. 2000).
[101] *Id.* at 7.
[102] *See* COMMERCIAL ACTIVITIES PANEL, FINAL REPORT: IMPROVING THE SOURCING DECISION OF THE FEDERAL GOVERNMENT 27 (Apr. 2002), *available at* http://www.gao.gov/a76panel/dcap0201.pdf.; GENERAL ACCOUNTING OFFICE, FEDERAL ACQUISITION: TRENDS, REFORMS, AND CHALLENGES, GAO/T-OCG-00-7, at 5-6 (Mar. 2000).

report), the available data does not exist to document the number of such vehicles in existence, let alone the increase in sales from year to year.

12. The Federal Acquisition Reform ("Clinger-Cohen") Act of 1996

In 1996, Congress passed the Federal Acquisition Reform Act[103]—later renamed the Clinger-Cohen Act[104]—as part of the National Defense Authorization Act for Fiscal Year 1996. The Clinger-Cohen Act expanded upon FASA's preference for commercial items by eliminating TINA's cost or pricing data requirements[105] and by relieving contractors from complying with certain cost accounting standards ("CAS").[106] The act also provided simplified procedures for the acquisition of commercial items with a purchase value of $5 million or less[107] and set up an even more streamlined process for the acquisition of commercially available, off-the-shelf items ("COTS").[108] Finally, the act amended the definition of "commercial items" to include established "market prices" within the provision governing standalone services.[109] This amendment adopted the language previously adopted in the FAR definition that implemented FASA.[110] [**MA COMMENT:** FASA did not eliminate TINA or CAS on contracts for commercial items. It simply revised the previously existing exceptions. Moreover, FARA at Section 4201 expressly stated what type of data should be obtained on contracts for commercial items - the first expression ever made by Congress in this area - that is, appropriate information on prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price for the procurement. This is a critical point to this discussion, but does not receive any attention until page 50 of Section 1.]

13. Recent Congressional and Executive Reforms

Even after the Clinger-Cohen Act, Congress and the Executive Branch have made subtle changes to the definition of "commercial items" and the process for their acquisition. First, in 1998, Congress directed the Executive

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[103] Pub. L. No. 104-106, div. D, 110 Stat. 642 (1996).
[104] Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).
[105] Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).
[106] *Id.* § 4205, 110 Stat. at 656.
[107] *Id.* § 4202, 110 Stat. at 652-53.
[108] *Id.* § 4203, 110 Stat. at 654-55.
[109] *Id.* § 4204, 110 Stat. at 655-56.
[110] Federal Acquisition Regulation, Acquisition of Commercial Items, 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).

Branch to modify the FAR's definition of "commercial items" to clarify such terms as "established catalog prices" and "established market prices."[111] Then, in 1999, Congress amended the statutory definition of "commercial items" to define what constitutes services in support of commercial items.[112] These legislative efforts helped to produce a revised regulatory definition for "commercial items," which was codified in the FAR.[113] Finally, in 2003, Congress amended the definition of "commercial items" in order to accommodate explicit authorization for time-and-material commercial services contracts.[114] [**MA COMMENT:** Section 803 of P.L. 105-261 did not instruct DoD to clarify "established catalog prices" and "established market prices." Instead, Section 803 required DoD to provide specific guidance on the appropriate application of such price analysis tools, such as catalog-based pricing and market-based pricing. Section 803, however, did require that DoD clarify the meaning and appropriate application of "purposes other than governmental purposes." This does not appear to be covered at all in Section 1. It should also be noted that industry has significant concerns about how the Government implemented Section 803.] Section 814 of the National Defense Authorization Act for FY 2000 authorized the Secretary of Defense to initiate a 5-year pilot program treating procurement of some services "as" commercial items.[115] Section 821 of the FY 2001 National Defense Authorization Act expands the authority to procure services as commercial items. It establishes a preference for performance-based contracting for services and allows DoD to award any applicable performance-based contract as a commercial item under Federal Acquisition Regulation (FAR) part 12, "Acquisition of Commercial Items," if: the contract or task order is valued at $5 million or less; the contract or task order sets forth specifically each task to be performed and (1) defines each task in measurable, mission-related terms, (2) identifies specific end products or output, and (3) has a firm fixed price; and the source of the services provides similar services contemporaneously to the general public under similar terms and conditions.[116] Lesser reforms have also been made in various Defense Authorization laws.[117]

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[111] Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 803(a), 112 Stat. 1920, 2082 (1998).
[112] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 805, 113 Stat. 512, 705 (1999).
[113] Federal Acquisition Regulation, Acquisition of Commercial Items, 66 Fed. Reg. 53,477 (Oct. 22, 2001).
[114] Service Acquisition Reform Act of 2003, Pub. L. No. 108-136, tit. XIV, § 1432, 117 Stat. 1663, 1672-73 (2003).
[115] National Defense Authorization Act for Fiscal Year 2000, Pub. L No. 106-65 (2000).
[116] National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106-398 (2001).
[117] *See, e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 816, 118 Stat. 1811, 2015 (2004); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XIV, § 1431, 117 Stat. 1663, 1671-72 (2003) (containing the Service Acquisition Reform Act of 2003); Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §

14. The Services Acquisition Reform Act of 2003

Congress also enacted several substantive statutes related to acquisition, including the Federal Activities Inventory Reform ("FAIR") Act of 1998[118] and, most notably the Services Acquisition Reform Act ("SARA") of 2003.[119] The FAIR Act mandated that government agencies produce lists of activities that are "not inherently governmental functions" and required private sector competitions for the performance of those functions.[120] `Through SARA, Congress sought to improve the acquisition workforce[121] and make various reforms, including incentives for performance-based contracting[122] and special emergency procurement authority, that permits agencies to utilize emergency acquisition authority under the "commercial items" exemptions.[123]

With specific reference to services acquisition, SARA made three changes. First, it authorized performance-based contract or task orders for the procurement of services to be "deemed" a "commercial item" under specified circumstances: (1) if the value of the contract or order is not expected to exceed $ 25 million; and (2) if the contract or order specifically sets forth (i) each task to be performed, (ii) defines each task in measurable, mission-related terms, and (iii) identifies the specific result to be achieved. In addition, such performance-based commercial services contracts must contain firm fixed-prices, and further, the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Government. [124]

Second, Section 1432 of the Act authorizes the limited use of a time-and-materials (T&M") or labor-hour ("LH") contracts in the procurement of commercial services subject to certain restrictions, including that the services: (i) are commonly sold to the general public through such contracts; (ii) are purchased by the procuring agency on a competitive basis; (iii) the contracting

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812, 116 Stat. 2458, 2609 (2002); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 823, 115 Stat. 1012, 1183 (2001).

[118] Pub. L. No. 105-270, 112 Stat. 2382 (1998).

[119] Pub. L. No. 108-136, tit. XIV, 117 Stat. 1663 (2003).

[120] Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 2, 112 Stat. 2382, 2382-83 (1998).

[121] *Id.* sub-tit. A, §§ 1411-14, 117 Stat at 1663-66.

[122] *Id.* sub-tit. C, § 1431, 117 Stat. at 1671-72.

[123] *Id.* sub-tit. D, § 1443, 117 Stat. at 1675-76.

[124] Pub. L. No. 108-136, tit. XIV, 117 Stat. 1663, § 1431; codified at 41 U.S.C. § 403.

officer executes a determination and finding that no other contract type is suitable; (iv) the contracting officer includes a ceiling price that the contractor exceeds at its own risk; and (v) the contracting officer authorizes any subsequent change in the ceiling price only upon a documented determination that it is in the best interest of the procuring agency to change the ceiling price.

Third, Congress looked at the definition of stand-alone services in FASA and maintained that definition with a revision to permit use of commercial items when the services are sold competitively in the commercial marketplace based on catalog or market prices for "specific outcomes" to be achieved as well as for specific tasks performed. [**MA COMMENT:** This is misleading given the actual legislative history. Since the passage of FASA, the treatment of services has been a problem for both Government users and commercial providers. In fact, DoD sought recommendations from a private industry working group for finding better ways to integrate services into the definition of "commercial item." The favored recommendation was to not single out services in the definition, that is, strike subparagraphs (E) and (F) from the definition of "commercial item." Such a revision was passed in 2003 by the House (H.R. 1837) but not by the Senate. What emerged from the conference fell far short of what was desired by private industry.]

In the SARA provisions, Congress also adopted a practice of deeming certain products or services to qualify for commercial item treatment, regardless of whether they were offered commercially. Section 1443(d)[125] provides authority to the head of an agency to treat certain procurements for defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack as commercial items, subject to the restriction that, if a contract greater than $15 million in value is awarded on sole source basis, the provisions of TINA and CAS shall apply.

15. Restrictions on Use of Commercial Items

In the Defense Authorization Act of 2005, Congress restricted the relief from the requirement for cost or pricing data for commercial items. This change provides that cost or pricing data is required for noncommercial modifications to commercial items that are expected to cost, in the aggregate, more than $500,000 or 5% of the total price of the contract, whichever is greater.[126] The provision took effect on June 1, 2005, and applies to offers submitted, and

[125] Id. at § 1443; codified at ____.
[126] P.L. 108-375, § 818.

modifications to contracts or subcontracts made, on or after that date. Interim Regulations implementing the provision became effective on June 8, 2005. [127]

D. Time and Materials and Labor Hour Contracts

1. Definition and Description – The Current Rule

A time-and-materials (T&M) contract provides for the acquisition of supplies or services on the basis of direct labor hours at specified fixed hourly rates and/or the cost of any materials used for the project. This contrasts with fixed-price contracts where the contractor is paid a firm fixed-price for completion of the contract, irrespective of the amount of time or materials expended on the project.

The use of T&M contracts is governed by FAR Part 16, and FAR 16.601 provides a description of the T&M contract, lays out its appropriate application, and limits its use. T&M contracts are permitted when the contracting officer determines that "it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence."[128] In other words, where the buyer cannot determine its requirements sufficiently to use another contracting method. However, since T&M contracts provide "no positive profit incentive to the contractor for cost control or labor efficiency,"[129] the FAR makes T&M contracts the least preferred of all contract types. The most important limitation on the use of time and materials contracts is found in FAR 16.601(c)(1), which provides that T&M contracts may be used "only after the contracting officer executes a determination and findings that no other contract type is suitable…"[130]

Under the current FAR rules, T&M contracts make a labor hour a unit of sale, but they do not make efficient or successful performance a condition of payment. Under FAR 52.232-7(a)(1), the contractor bills the Government by multiplying the appropriate hourly rates prescribed in the GSA schedule by the number of direct labor hours performed.[131] The rates are to include wages, indirect costs, general and administrative expense, and profit. Also, FAR 16.601(c)(2) requires that a T&M contract shall not be used unless the contract includes a "ceiling price that the contractor exceeds at its own risk." The total

[127] 70 Fed. Reg. 33659 (June 8, 2005); *See* FAR 15.403-1(c)(3)(ii)(B), and (C).
[128] FAR § 16.601 (b).
[129] FAR § 16.601(b)(1).
[130] FAR § 16.601(c)(1).
[131] FAR § 52.232-7(a)(1) (Payments under Time-and-Material and Labor-Hour Contracts).

cost of the contract is not to exceed the ceiling price set forth in the schedule, and the contractor must agree to make its best efforts to perform the work within the ceiling price.[132] However, the contractor is not obligated to continue performance if to do so would exceed the ceiling price, unless the contracting officer notifies the contractor that the ceiling price has been increased.[133] In addition, the Government is required to pay the contractor at the hourly rate, less profit, for correcting or replacing defective services.[134] If the contractor is terminated for default or defective performance, the Government, nonetheless, is obligated to pay the contractor at the hourly rate, less profit, for all hours of defective performance.[135] [**MA COMMENT:** This is a conclusion that belongs in the analysis section. Many would disagree with the conclusion that a T&M contracts does not make efficient or successful performance a condition of payment. The "Inspection - Time-and-Material and Labor-Hour" clause at FAR 52.246-6 provides the Government some protections in this area. Under the "Payments Under Time-and-Material and Labor-Hour Contracts" clause at FAR 52.232-7, the Government is authorized to withhold amounts considered necessary to protect its interests. Furthermore, T & M contracts need the same type of oversight during performance that Cost Reimbursement contracts need. Post contract audits of either Cost Reimbursement contracts or Time and Material contracts is not an adequate substitute for contract & subcontract administration. In reading the draft, one could conclude the drafters think that cost auditing is the answer.]

Under the current FAR provisions, therefore, the contractor does not have to complete the work successfully in order to obtain payment, rather the contractor is paid for the hours devoted to the task regardless of outcome. Therefore, substantial oversight is necessary for T&M contracts. Agencies are advised in FAR 16.601(b)(1) that "appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used."

2. Recent Legislative Developments

As noted above, section 1432 of the Services Acquisition Reform Act (SARA)[136] amended section 8002(d) of the Federal Acquisition Streamlining Act (FASA) to authorize the use of T&M contracts for the procurement of commercial services commonly sold to the general public through such contracts. As amended, section 8002(d) places certain conditions on the use of T&M contracts

[132] FAR § 52.232-7(c).
[133] FAR § 52.232-7(d).
[134] FAR § 52.246-6
[135] FAR § 52.249-6, Alt. IV.
[136] Defense Authorization Act for FY 2004, Pub. L. No. 108-136.

for purchases of commercial services under Federal Acquisition Regulation (FAR) Part 12: (1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories as prescribed in FASA section 8002(d); (3) the contracting officer must execute a determination and findings (D&F) that no other contracting type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency.[137]

The House Conference Report for section 1432 noted that section 821 of the Floyd D. Spence National Defense Authorization Act for FY 2001[138] established a statutory preference for performance-based contracts and performance-based task orders that contain firm, fixed-prices for the specific tasks to be performed.[139] The Report stated that section 1432 should not be read to change that preference.[140] "A performance-based contract or task order that contains firm fixed-prices for the specific tasks to be performed remains the preferred option for the acquisition of either commercial or non-commercial items."[141]

Despite the preference for any other contract type, the use of T&M contracts by the Government is widespread. The GSA Office of the Inspector General conducted a survey of procurement officials who placed task orders against Multiple Award Schedules contracts during 2002 and 2003. Of the 1900 contractors who responded, 60 percent indicated that they used T&M or labor hour contracts. (cite) [**MA COMMENT:** These statements fail to recognize that it is the RFP written by Government personnel that dictates the type of contract to be used. The number of FSS users, not contractors as stated above, who use T&M orders is a direct reflection of the number of Government RFP's that specified that type of order. It is misleading to say that the contractors "used" T&M or labor hour contracts. Furthermore, support provided for these statements is weak or, at best, unclear. For example, are the percentages based on dollars or actions? Based on the Panel's minutes, the GSA IG representative stated that 5,000 *FSS users* were surveyed with 2,000 responding. Of those responding, it was said that two-thirds of all orders placed by respondents were T&M orders. But that does not match what was presented in the GSA IG's charts - one-third was FFP orders. It does not necessarily follow that all remaining orders were T&M orders. Plus, even if they were regarded as T&M orders, the

[137] SARA § 8002(d); FAR § 16.601.
[138] Pub. L. No. 106-398.
[139] H.R. Rep. No. 108-354 (2003) (Conf. Rep.).
[140] Id.
[141] Id.

possibility must be recognized that these days many FSS orders are hybrid contract types. That is, even a T&M contract can have a large material portion being purchased under a FFP arrangement. The statistics and logic do not seem to support the inference being made here by the CPWG. The suggestion, intentional or not, that 60% of MAS contracts are T&M or LH is not believable.]

3. OFPP's Proposed Rule

It should be noted that the amendment section 1432 made to FASA section 8002(d) is not self-executing. Rather, implementation of section 8002(d) requires the Office of Federal Procurement Policy (OFPP) to revise FAR's current commercial items policies and associated clauses. The OFPP, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a notice in the Federal Register soliciting comments regarding amendment to the FAR to account for T&M contracts.[142] Subsequently, OFPP and the Councils issued a proposed rule,[143] which is yet to be finalized.

The proposed rule allows an agency to purchase any commercial service on a T&M basis if it prepares a D&F containing sufficient facts and rationale to justify that a firm fixed-pricing arrangement is not suitable. With respect to the contents of the D&F, the rule provides that the rationale supporting use of a T&M contract for commercial services should establish that it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. If the need is of a recurring nature and is being acquired through a contract extension or renewal, the rule requires that the D&F reflect why knowledge gained from the previous acquisitions could not be used to further refine requirements and acquisition strategies in a manner that would enable purchase on a fixed-price basis. The stated goal of the proposed rule is to ensure that T&M contracts are used only when in the best interests of the Government.

E. Competition

1. A History of Difficulty in Achieving Competition

The long history of public contracting problems and the various legislative attempts at solutions was discussed and reported in the Report of the Commission on Government Procurement ("1972 Commission Report).[144] Issues

[142] 69 Fed. Reg. 56316 (Sept. 20, 2004).
[143] 70 Fed. Reg. 56318 (Sept. 26, 2005).
[144] COMM'N ON GOV'T PROCUREMENT, REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 163-84 (1972).

such as how to encourage competition and assure reasonable prices have been recurrent themes. The Government Procurement Commission Report discusses the various studies of these issues over the years, including the Dockery Commission (1893), the Keep Commission (1905), the two Hoover Commissions, and that of the Commission on Government Procurement itself. The Report traces the development of the "formal advertising" competition requirement in the two basic procurement statutes enacted after Word War II; namely, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. Although these laws expressed a preference for competition, exceptions to competition requirements permitting "negotiated" contracts raised considerable concern whether or not the competition requirements were being met, particularly as the dollar value of government contracts increased. The Armed Services Procurement Act was amended in 1962 to enhance competition in negotiated procurements.[145]

2. The Current Situation

As discussed below, currently, there are at least three different competition regimes for federal procurement. The Competition in Contracting Act generally requires "full and open" competition (subject to certain exceptions for urgency, single source, *etc*., that must be supported by a justification). However, today a large volume of federal procurement dollars are spent through processes that involve different types of procedures from the processes set forth in FAR Parts 14 (Sealed Bids) and 15 (Contracting By Negotiation). Currently, the requirements of FAR Parts 14 and 15 do not apply to two parallel ordering regimes under which a huge volume of purchases is made.

First, the CICA statute provides that in addition to contracts entered into pursuant to full and open competition, the term "competitive procedures" also includes procedures established for the GSA schedules.[146] As discussed below, the use of the GSA schedules for acquisition of commercial services has exploded since the late 90's. As this growth has occurred, GSA has developed processes for obtaining competition under the GSA schedules that are different from the typical processes used under FAR Parts 14 and 15. Although prices on the schedules are deemed competitive, and orders can be placed directly, GSA also has developed additional tools, discussed further below, that allow buyers to seek further price reductions.

[145] S. Rep. No. 98-50, at 5 (1984).
[146] 41 U.S.C. § 259(b)(3).

Second, also as discussed below, task and delivery orders placed under other government-wide or multiple award contracts (such contracts usually awarded initially through Part 15 procedures) are subject to the requirement for a "fair opportunity to compete" among the contract holders if a waiver is not exercised. There is no requirement that these "mini-competitions" be synopsized[147]. Data requested by the Panel indicates that significant numbers of large orders, in excess of $10 million, have been placed under these vehicles.

3. ***The Competition in Contracting Act***[148]

In 1982, contracting officers of various agencies testified before Congress to the effect that, while competition in government contracting was the requirement, it was not the practice. Congress attempted to reform the procurement process in 1984 by passing the Competition in Contracting Act (CICA). CICA provided that competition, rather than the common practice of "formal advertising" (sealed bidding), should be the norm. **[MA COMMENT:** The problem was that too much sole source contracting was occurring. Since both "sole source" and "competitive negotiation" were known as "negotiations," agencies were too often using sole source when they could have used competitive negotiation. Formal advertising (sealed bidding) is a form of competition.]

Although drafts of CICA used the term "effective competition," the conferees ultimately adopted "full and open competition" as the standard for federal procurement. The Report of the House Government Operations Committee on CICA explained the benefits of competition:

> The Committee has long held the belief that any effort to reform Government procurement practices must start with a firm commitment to increase the use of competition in the Federal marketplace. Competition not only provides substantially reduced costs, but also ensures that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to compete.[149]

The premise that underlies this strong preference for "full and open competition" is the economic premise that has long been recognized by the courts as the basis

[147] FAR 16.505(1).
[148] Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified, as amended, in scattered sections of the United States Code).
[149] H.R. REP. No. 1157, 98th Cong., 2d Sess. 11 (1984).

for a free market economic system—that full and open competition brings consumers the widest variety of choices and the lowest possible prices.[150]

CICA defined "full and open competition" to mean "all responsible sources are permitted to submit sealed bids or competition proposals on the procurement."[151] In addition, to ensure that agencies did not lightly sidestep the competition requirement, Congress established requirements to justify departures from full and open competition. For example, CICA provided that full and open competition could be avoided only through one of seven limited exceptions,[152] and it required a written justification & approval (J&A) document to be filed if one of the exceptions was invoked.[153] In addition, Congress mandated that the head of each agency designate a Competition Advocate and required that all J&A's for procurements of $500,000 or more be approved by the Competition Advocate for each agency.[154] **[MA COMMENT:** The seven exceptions long predated CICA, as did the authority to use negotiated contracts, if one of the exceptions applied. CICA's big change was putting competitive negotiation on par with formal advertising as another form of competition and as the preferred method.]

CICA expressly permitted the use of negotiated contracts, rather than sealed bids, provided that the Government's requirements and evaluation factors were clearly expressed so that offerors could understand the ground rules and provided further that the Government must follow its stated requirements and evaluation factors in the source selection process. CICA also permitted best value selections based on technical, cost, and other factors, rather than just cost. In a best value source selection the Government can choose the overall best value for the particular mission; however, cost must be a consideration under CICA – it cannot be ignored. To support a best value selection, the source selection official must justify the trade off between the cost and technical merit of the offers in the competitive range. Thus, for each best value procurement, the government buyer has a record of the basis for the selection.

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[150] *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 500 (Fed. Cl. 1997) (citing ADAM SMITH, WEALTH OF NATIONS 112 (1776)).
[151] 41 U.S.C. § 403(6).
[152] 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).
[153] 10 U.S.C. § 2304(f)(1)(A); 41 U.S.C. § 253(f)(1)(A).
[154] Federal Acquisition Regulation 6.501.

4. The Use of Interagency Vehicles

In 1993, the Section 800 Panel Report[155] again discussed the fundamental role of competition in public procurement. Agencies complained about the time and delays involved in considering multiple proposals and their perceived inability to eliminate proposals that did not have an opportunity for success from consideration.[156] The Section 800 Panel gave serious consideration to amending the competition statute to provide for "adequate and effective competition" but, after extensive consideration,[157] decided to retain the definition of full and open competition. Among other things, the Section 800 Panel was concerned both with the strongly expressed views of Congress and the difficulties involved in defining "adequate and effective competition.[158]

Following submission of the Section 800 Panel report, Congress considered substituting the term "efficient competition" for "full and open competition." However, Congress retained the term "full and open competition." In 1996, during consideration of the Federal Acquisition Reform Act, Congress provided guidance in use of the "full and open" standard by the following addition to 10 U.S.C. §2304(j) and 41 U.S.C. § 253(h): "The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Although the basic standard was not changed, in response to agencies expressed concerns, Congress tried to convey to agencies that they had flexibility in establishing the competitive range and in using competition to obtain the best result for the Government.

Two other issues entered into the practical application of competition at the time of FASA and FARA. First, was the increased use of task and delivery order contracts. Second, use of the GSA schedule has expanded dramatically in recent years to include the acquisition of services. These developments are discussed below.

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[155] Report of the Acquisition law Advisory Panel, Chapter 1, Contract Formation (Hereinafter "800 Panel Report").

[156] The complaint of difficulty in winnowing down the offers to those with the best chance of success was not a new one. Congress had addressed this very issue in considering the potential definition of "effective competition" in enactment of CICA. The CICA conferees expressed their view that the procurement process "should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received." H.R. REP. No. 861, 98th Cong., 2d Sess. 1422 (1984).

[157] The 800 Panel understood there could be situations in which the circumstances did not warrant the expense of proceeding with a full and open competition. 800 Panel Report, Chapter 1 at 1-24.

[158] *Id.* at 1-25.

5. Task and Delivery Order Contracts

a. Background

At the time of its deliberations, the Section 800 Panel reviewed the use of indefinite quantity and task order contracts. The Section 800 Panel noted concerns regarding the abuse of indefinite quantity and task order contracts for supplies and services, and the existing of Inspector General and audit reports criticizing the award and administration of such contracts.[159] The 800 Panel was concerned about the growing practice of awarding IDIQ contracts on a sole source basis. Recognizing these concerns and the inadequacy of the then existing statutory provision for master agreements for advisory and assistance services, the Section 800 Panel recommended a revision of the authority for indefinite quantity and task order vehicles. While noting the issue of expansion of the scope of such vehicles as a problem, the Section 800 Panel stated its belief that flexibility was necessary to permit award of contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value could not be determined at the time the basic contract was awarded.[160] Without this ability, the Section 800 Panel expressed concern that legitimate requirements and tasks would be unnecessarily delayed or result in improper sole source justifications or inappropriate undefinitized contract actions. **[MA COMMENT:** Contrary to the draft's statement, the 800 Panel stated:

> In the Panel's several discussions of these issues, the Panel generally considered that properly awarded indefinite quantity contracts, and other contracts involving delivery and task orders, are within the competition requirements of [10 USC] 2304, if the various requirements of chapter 137 of Title 10 and 41 U.S.C. §416 are compiled with.**]**

The Section 800 Panel then recommended a new statute that would provide some structure around the use of indefinite quantity and task order contracts. First, the basic contract had to be awarded pursuant to full and open competition (or a permissible properly approved exception). The competition for the basic contract was required to have provided: (i) "a reasonable description of the general scope, nature, complexity, and purposes of the supplies or services;" (ii) meaningful evaluation criteria, properly applied; and (iii) if multiple awards were made, a clear method of competing or allocating delivery or task orders among contracts.[161] If properly awarded, then with respect to delivery orders or

[159] 800 Panel Report, Chapter 1 at 1-32.
[160] *Id.* at 1-32, 33.
[161] *Id.* at 1-52.

task orders issued under that contract, no notice (synopsis) or separate competition (or justification) was required.[162] At the time, the Section 800 Panel believed that the potential for abuse of these vehicles was the expansion of the contract scope or period by a delivery or task order. Thus, the Panel recommendation prohibited any such expansion without use of full and open competition.[163]

In enactment of FASA,[164] Congress largely accepted the Section 800 Panel approach. FASA required that award of task or delivery order contracts be subject to full and open competition and included specific requirements for solicitations for such contracts, including specification of the contract period and the maximum quantity or dollar value to be procured. In addition, Congress stated that the solicitation should contain:

> A statement of work, specifications or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.[165]

Congress also included a preference for multiple awards to improve competition, stating it was establishing a "requirement that solicitations for such contracts shall ordinarily provide for multiple awards and for fair consideration of each awardee for task orders issues under the contract . . . ."[166] The Report of the Senate Government Affairs Committee, which originated the provisions regarding task and delivery order contracts, stated its reasons for their enactment as follows:

> The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed

[162] *Id.* at 1-53.
[163] *Id.* "The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not."
[164] 41 USCA § 253(j); and 10 USCA § 2304a-d
[165] 41 USCA § 253h; and 10 USCA § 2304a.
[166] 41 USCA § 253h(d)(3); 10 USCA § 2304a(d)(3); S.REP. No. 103-258, 103rd Cong. 2d Sess., 15 (1994).

> without significantly burdening the procurement system, by awarding multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, whenever it is practical to do so.[167]

Anecdotal evidence (considered in the absence of empirical data) suggests that it is not uncommon today for awards to be made to most, and even all, offerors responding to a task or delivery order solicitation. In such cases, the buyers actual requirements are not known and no price competition occurs for those requirements at the time the umbrella vehicle is awarded, rather, the requirements are made known later when the buyer desires to place an order.

b. "Fair Opportunity"

FASA mandated that agencies award orders through competition. Specifically, the statute required that all contractors awarded such contracts be provided a "fair opportunity to be considered" for each task or delivery order in excess of $2,500,[168] subject to four exceptions: (1) circumstances of unusual urgency that will not permit fair opportunity; (2) only one contractor has the capability to provide the highly unique or specialized services necessary; (3) a sole source order is necessary as a logical follow-on to an existing order already issued on a competitive basis; or (4) the non-competitive order is necessary to satisfy a minimum guarantee.[169]

The fair opportunity process has been implemented in FAR Subpart 16.5, which applies to orders placed against multiple award GWACs and MACs. Although FASA called for a "fair opportunity to be considered," studies conducted by GAO and agencies' inspector generals after the Act was implemented indicated that agencies did not consistently promote competition or justify exceptions to competition.[170] To address these concerns, Congress enacted section 804 of the National Defense Authorization Act for Fiscal Year

[167] S.REP. No. 103-258, 103rd Cong. 2d Sess., 15 (1994).
[168] 41 USCA § 253j; 10 USCA 2304c(b).
[169] 41 USCA § 253j; 10 USCA 2304c(b).
[170] See U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-393 (Washington, D.C.: August 2003), at page 7.

2000.[171] This provision directed that the FAR be revised to provide guidance regarding the appropriate use of task and delivery order contracts. The guidance, at a minimum, was to identify specific steps that agencies should take to ensure that (1) all contractors are afforded a fair opportunity to be considered for the award of task and delivery orders and (2) the statement of work for each order clearly specifies all tasks to be performed or property to be delivered. In April 2000, the FAR was revised to address these topics.

Under the FAR, fair opportunity requires, with limited exceptions, that all awardees are afforded a fair opportunity to be considered for each order exceeding $2,500. The current FAR gives contracting officers significant discretion in applying the fair opportunity standard. For example, FAR 16.505(b)(1)(ii) provides that contracting officers "need not contact each of the multiple awardees…if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order."

c. Section 803 Revisions to "Fair Opportunity"

Notwithstanding the measures to further define the fair opportunity standard and the discretion afforded by the FAR, Congress continued to have concern regarding the adequacy of competition under multiple award contracts, particularly for services. For example, Section 803 of the National Defense Authorization Act for Fiscal Year 2002 required DoD to promulgate regulations requiring competition in the purchase of services by DoD under multiple award contracts. It stated that the regulations shall require DoD to award offers "on a competitive basis," absent a waiver.[172] The statute provided that a purchase of services would be made on a "competitive basis" only if it was made pursuant to procedures that required "fair notice" of the intent to make a purchase to be given to "all contractors offering such services under the multiple award contract" and afforded all contractors that respond "a fair opportunity to make an offer and have that offer fairly considered" by the official making the purchase.[173] Thus, Section 803 went beyond the FAR in that, when implemented, it would require agencies to solicit offers from contract holders to meet the "fair opportunity" test.

DoD promulgated regulations to implement Section 803. The regulations, which became effective in October 2002, require that each order of services

[171] P.L. No. 106-65 (Oct. 5, 1999).
[172] See National Defense Authorization Act for Fiscal Year 2002, Sec. 803(b)(1).
[173] *Id.*, sec. 803(b)(2).

exceeding $100,000 shall be placed on a "competitive basis." The regulations provide that an order is made on such a basis only if the contracting officer:

> (1) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the service under the multiple award contract; and
>
> (2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.[174]

The regulations also permit the contracting officer to waive the competition requirement under certain circumstances.[175] As discussed below, the DoD regulations also cover ordering procedures for services under schedule contracts.

In July 2004, GAO issued a report regarding DoD's implementation of Section 803.[176] GAO found that competition requirements were waived for nearly half of the task orders surveyed. GAO noted that, as a "result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value for the taxpayer."[177] GAO found that, in the majority of cases where waivers were invoked, it was done at the request of the government program office "to retain the services of contractors currently performing the work."[178] The report further found that roughly two-thirds of the cases in which waivers were invoked were in federal supply schedule orders.[179] For orders that were available for competition, buying organizations awarded more than one-third after receiving only one offer.[180]

In its July 2004 report regarding Section 803, GAO recommended that DoD:

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[174] See DFARS 216.505(c).
[175] See DFARS 216.505(b).
[176] U.S. Government Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-774 (Washington, D.C., July 2004).
[177] *Id.*, at 6.
[178] *Id.*,
[179] *Id.*
[180] *Id.*, at 3.

- develop additional guidance on the circumstances under which the logical follow-on and unique services waivers may be used;

- require that all waiver determinations be supported by documentation describing in detail the circumstances that warrant the use of a waiver; and

- establish approval levels for waivers under multiple award contracts that are comparable to the approval levels for sole-source federal supply schedule orders under subpart 8.4 of the FAR.[181]

The agency implementation of the "fair opportunity" required by FASA thus has been uneven and subject to refinement by Congress to encourage competition. In enacting Section 803, for example, Congress required agencies to take specific steps beyond the current FAR "fair opportunity" procedures and specifically required that agencies actually solicit offers from all of the contractors to whom the agency has awarded MACs for the services at issue.

7. GSA Federal Supply Schedule

a. Background

With enactment of the provisions for commercial items, the acquisition of services on the GSA Federal Supply Schedule increased dramatically. Today, services account for about two-thirds of all schedule sales. GSA offers professional services through the schedule in a variety of areas, including: general purpose commercial Information Technology Equipment, software and services (known as the "IT 70" Schedule); Financial and Business Solutions ("FABS"); Mission Oriented Business Integrated Services ("MOBIS'); Professional Engineering Services ("PES"), and Environmental Services. Companies offering these services agree to perform the identified services for hourly rates identified on the Schedule. As noted above, GSA's schedule sales have grown rapidly since 2000. This is especially true for services. [**MA COMMENT:** As previously stated, the suggested cause and effect is not necessarily true. There were clearly other forces at work. *See comment in text at pages 13, 14 & 15.*]

Within the schedules program, the Services Acquisition Center offering the PES, FABS, and Advertising and Integrated Marketing (AIMS) Schedules has grown remarkably. The Services Acquisition Centers FY 2005 sales were $3.5 billion. During the last three years, its sales have grown by 164 percent, showing

[181] *Id.*, at 17.

a substantial demand for professional services. Although services under the IT 70 schedule grew less dramatically (only one percent in FY 2005), IT 70 schedule sales totaled $16.9 billion in FY 2005, accounting for approximately 50.8 percent of total Schedule sales. [*add most current data available in 2nd Q FY 06*]

Federal Supply Schedule ("FSS") contracts are awarded pursuant to GSA's separate authorizing statute. CICA defined "competitive procedures" also to mean the GSA schedules so long as: (1) participation in the program is open to all responsible sources; and (2) orders and contracts under such procedures result in the lowest overall cost alternative to meet the Government's needs.[182] Thus, orders placed under the schedules are deemed to be the product of full and open competition because they are expected to be items and services routinely purchased in the commercial marketplace. GSA's regulations implementing the FSS program are set forth in FAR Subpart 8.4. For the FSS program, GSA maintains an open solicitation under which any contractor may submit an offer of a commercial item or service for award of an FSS contract.[183] Offerors under an FSS solicitation do not compete against other offerors; rather, prices are assessed against a standard of a fair and reasonable price. For services, the FAR states:

> GSA has already determined that the prices of fixed-price services and rates for services offered at hourly rates under schedule contracts to be fair and reasonable. [B]y placing an order against a schedule contract…, the ordering activity has concluded that the order represents the best value…and results in the lowest overall cost alternative (considering price, special features, administrative costs, *etc.*) to meet the Government's needs.[184]

Once a contractor's products or services are placed on the GSA schedules, any agency may order pursuant to the ordering procedures set forth in FAR 8.4.

> Although GAO generally lacks jurisdiction to hear protests involving the issuance of delivery and

[182] 41 USCA § 259.
[183] As of the date of this report, more than 17,000 companies have schedule contracts.
[184] FAR § 8.404(d).

task orders,[185] GAO has determined that its bid protest jurisdiction under the Competition in Contracting Act[186] does extend to competitions conducted under FSS contracts.[187]

[**MA COMMENT**: This section confuses the statutory requirement for full and open competition with private companies' use of the marketplace to get effective competition. Private company practices vary widely, but it is fair to say private companies seldom solicit offers from all qualified vendors as the government's full and open competition requires. Instead, private companies limit competitors and solicit full proposals from a few using their market knowledge both to select the vendors and to ensure the ultimate contract price is fair. Thus the schedule program bears some similarity to such practices since GSA only awards schedule contracts to vendors who agree to fair and reasonable prices and agencies are supposed to ensure total order pricing is fair and represents best value. (FAR 8.404(d))

b. Market Prices

As discussed above, orders placed under the schedules are deemed to be the product of full and open competition because it is presumed that they are items and services routinely purchased in the commercial marketplace. GSA attempts to ensure that the prices and labor rates of an FSS contract are reasonable through analysis of commercial pricing policies and practices and use of pre-award audits by the GSA IG of those commercial prices. In recent years GSA has increased the surveillance of commercial prices. The number of pre-award audits is increasing. During fiscal year 2003 to 2005, the number of pre-award audits performed increased from 18 to 40 to 70 (p15, GAO-05-229). According to GSA, the goal is set at 100 in fiscal year 2006. [**MA COMMENT:** GSA's pricing and audit policies have long been criticized by private industry.

[185] 41 USCA § 253j(d); 10 USCA § 2304c(d).
[186] See 31 USCA § 3551 *et seq.*
[187] E.g., *Savantage Financial Services, Inc.*, B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113. *See, Systems Plus, Inc. v. United States, 68 Fed. Cl. 206 (2005),* where the extent of the authority for review of FSS competitions has been called into question. In recently rejecting a challenge to an agency decision not to implement a stay of performance in regard to the award of an order under a schedule contract, the U.S. Court of Federal Claims distinguished FAR Part 15 procurements from the competitions conducted under FAR subpart 8.4 for purposes of the statutory stay outlined in the statute that sets forth GAO's bid protest jurisdiction.

This has been well documented. The CPWG's analysis illustrates a fundamental fallacy of some that audits are the means to assure fair pricing. In fact, the way to assure fair pricing is to put resources into negotiating well before contract award. To its credit, GSA training on the Federal Supply schedules recognizes this:

> "the Contracting Officer will assure that each offer is fair and reasonable based on the Contracting Officer's understanding of the market and the information submitted by the seller. The pricing objective is generally to achieve pricing comparable to that offered the seller's most favored customer. The resulting contracts are considered competitive because the pricing and service and/or product descriptions are molded by the competition of the commercial marketplace." [188]

Also to its credit, Congress has also recognized that submission of certified cost or pricing data is a poor substitute for knowing the market and encouraging competition.[189]]

c. Streamlined Ordering Process

The use of GSA schedules provides for a simplified ordering process. For instance, as long as ordering activities (i.e., buyers) comply with the regulatory ordering policies and procedures established by GSA and set forth in FAR Section 8.405, the order is not subject to the requirements of FAR Parts 13 (Blanket Purchase Agreements), Part 14 (Sealed Bidding), Part 15 (Contracting By Negotiation), or 19 (Small Business Programs (except for the requirement at 19.202-1(e)(1)(iii) dealing with bundling in small business procurements)). Buyers still must comply with all FAR requirements regarding bundled contracts, if the order meets the definition for a bundled contract at FAR 2.101(b). The GSA schedules also may be used to meet agency small business goals.

(i) Policies and Procedures for Ordering Services

While there are no dollar limits for orders placed under GSA Schedule contracts, the ordering procedures specified in the FAR differ depending on a number of factors, including dollar thresholds. More specifically, the ordering procedures vary depending on

[188] **MA FOOTNOTE** "How to Become a Contractor - GSA Schedules Program course" at GSA Center for Excellence https://fsstraining.gsa.gov/kc/Securelogin/login.asp?kc_ident=kc0001

[189] **MA FOOTNOTE** In FASA, Congress amended 10 USC §2306(b) and 41 USC §254b to prohibit agencies from getting certified cost or pricing data when there was adequate price competition. See FAR 15.403-1.

- whether the acquisition is for supplies or services
- if services, whether they are of a type requiring a statement of work, i.e., statement of the buyer's requirements (SOW)
- the dollar value of the purchase
    - at or below the micropurchase threshold, currently set at $2,500
    - exceeding the micro purchase threshold but not exceeding the maximum order threshold (the latter representing the dollar value, established by category of supply or service, at which the ordering activity shall seek a price reduction)
    - exceeding the maximum order threshold
- whether a Blanket Purchase Agreement (BPA) is being established under the schedule contract for the fulfillment of repetitive needs for supplies or services.

For any orders of services at or below the micro purchase threshold, the buyer may place orders with any FSS contractor that can meet the agency's needs, without regard to whether an SOW was used.[190]

For orders of services under the maximum order threshold, if a SOW is not used (e.g., for commoditized services such as installation, maintenance or repair services), the ordering activity may simply survey at least three schedule contractors.[191] Such a survey of prospective suppliers on the schedules may be accomplished through a review of the "GSA Advantage![192] On-line" shopping service or by review of catalogs or pricelists from three contractors. [193] For orders in excess of the maximum order threshold, the policy is that buyers should seek a price reduction. [194] However, an award may be made even though no reduction is offered.[195]

[190] FAR 8.405-1(b) and 8.405-2(c)(1)
[191] FAR 8.405-1(c)
[192] As of January 2006, GSA Advantage! Provides more than 11.2 million different commercial services and products through its 17,495 contracts in 43 different Schedules. It features advanced search capability and has traffic of approximately 45,000 hits a day.
[193] See *id.*
[194] FAR § 8.405(d).
[195] FAR § 8.405(d)(3).

In cases where services priced at hourly rates are being acquired from schedule contractors, GSA policy calls for an SOW stating the buyer's requirements (e.g., the work to be performed, location, period of performance, schedule, performance standards, etc.) to be provided along with evaluation criteria in an RFQ.[196] In circumstances involving orders over the micro-purchase threshold, but less than the maximum order threshold where a SOW is called for, the policy is that the buyer provide such an RFQ to at least three qualified schedule contractors.[197] RFQs may be posted on e-Buy. Buyers are encouraged to request firm fixed-prices for the work scope.[198] The policy makes it clear that although the hourly rates are already on the schedule and deemed fair and reasonable (through deemed competition) the responsibility for obtaining a fair and reasonable price for the buyer's specific requirement considering the level of effort and mix of labor proposed, is the responsibility of the buyer.[199]

In purchases where the dollar value of the buy exceeds the maximum order threshold or if establishing a BPA under a schedule, the FAR instructs ordering activities whose order *does not* require a SOW to review the pricelists of additional schedule contractors, seek price reductions, and place the order or BPA with the schedule contractor that provides the best value.[200] However, as noted above, the order may be placed even if no price reductions are forthcoming.[201]

For those orders exceeding the maximum order threshold or for establishing a BPA for services that require a SOW, the policy is that buyers provide the RFQ to additional schedule contractors, or to any schedule contractor who requests the RFQ. In order to determine the appropriate number of additional contractors, buyers should consider, among other factors, the complexity, scope, estimated value of the requirement and market research. GSA places the responsibility on the buyer whose requirement is being filled, to evaluate the responses and make an award to the schedule contractor determined to offer best value based on a consideration of the level of effort and the proposed labor mix for the task defined in the SOW.[202]

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[196] FAR § 8.405-2(c).
[197] FAR § 8.405-2.
[198] FAR § 8.405-2(c)(2)(iii).
[199] FAR § 8.405-2(d).
[200] FAR 8.405-1(d)(1)-(3)
[201] FAR 8.405-1(d)(3).
[202] FAR 8.405-2(c)(3)-(4) and 8.405-2(d)

As with task orders under MACs, DoD regulations impose the requirements of Section 803 for services orders over $100,000 under FSS contracts.[203] DoD recently extended this coverage to supplies over $100,000.

The Internet-based tool e-Buy often is used for order competitions under the GSA schedules. This tool is designed to facilitate the request for and submission of quotes or proposals for products and services offered through FSS contracts and GSA GWACs.[204] Agencies can use e-Buy to prepare and post a request for quotations for specific products and services for a specified period of time, and contractors may review the request and post a response. Under the e-Buy tool, the buying agency, not GSA, defines the requirements and writes the statement of work -- GSA does not review them. The buying agency selects the contractors who will be solicited for a quotation. However, the system is set up so that all vendors within the selected product/service categories or SINs can view the RFQ under the bulletin board and submit quotations. It is up to the vendor whether to make the effort to submit a quotation if that vendor did not receive a solicitation.[205] Using e-Buy satisfies the additional requirements of DFARS 208.405-70. DoD's implementation was addressed in the GAO report discussed above.[206]

Regardless of whether ordering activities use e-Buy, the ordering activity, not GSA, is responsible for establishing the dollar thresholds for BPAs and orders, developing a quality SOW when required, conducting the competition including selecting appropriate vendors to receive an RFQ when e-Buy is not used, and evaluating and selecting the schedule contractor to fulfill their requirements.

(ii) Schedule BPAs

Blanket Purchase Agreements (BPAs) under GSA schedules also are used as a tool to streamline the ordering process. BPAs originally were designed to provide a simplified method for government agencies to meet their repetitive

[203] See DFARS 208.404-70.
[204] https://www.gsaadvantage.gov/advgsa/ebuy/ctrler/EbuyHome?com.broadvision.session.new=Yes.
[205] Postings on e-Buy have been continually increasing since its inception in August 2002. During Fiscal Years 2003 and 2005, postings increased from 13,282 to 25,582 to 41,179. As of January 2006, there have been 8,023 postings representing an approximately 17 percent increase over the same period in Fiscal Year 2005. On average, three quotes have been received per closed RFQ during Fiscal Year 2005.
[206] See U.S. Government Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-774 (Washington, D.C., July 2004).

needs for unpredictable quantities of commodities.[207] With the addition of services priced at hourly rates to the Federal Supply Schedules, schedule BPAs for these services in some ways more closely resemble indefinite-delivery, indefinite-quantity (IDIQ) services contracts in their application and use than traditional FAR Part 13 BPAs with their individual purchase limitations.[208] BPAs under GSA schedules may be single BPAs or multiple BPAs. Schedule BPAs also may be established for the use of a single agency, or may be established for multi-agency use if the BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

While fair opportunity requirements that apply to umbrella IDIQ contracts do not apply to multiple BPAs, the establishing agency must specify the ordering procedures to be used by the ordering activity(ies) and the ordering activity(ies) must forward their requirement, including any statement of work (SOW) and evaluation criteria, if required, to an appropriate number of BPA holders, as established by the BPA's ordering procedures.

Unlike traditional FAR Part 13 BPAs with their dollar threshold limitations, BPAs under GSA schedules have been used for streamlining large buying programs for various types of services in addition to supplies. While dollar thresholds invoke varying ordering procedures under GSA schedules (as discussed above), there are no dollar limits for an order or a BPA. After complying with the ordering policies discussed above under FAR Subsection 8.405-1 or -2 as applicable for establishing the BPA, and estimating the quantities or work to be performed[209], the ordering activity may place orders as the need arises for the duration of the BPA, usually 5 years, without notice requirements or competition beyond that required under the BPA's ordering procedures. As discussed above, FAR Subsection 8.405-3(b)(3) requires that those placing orders under a BPA for hourly rate services develop a SOW for the order and ensure that the order specifies a price for the performance of the tasks identified in the SOW. So, while the hourly rates are themselves already deemed fair and reasonable, FAR Subsection 8.405-2(d) places the responsibility for considering the level of effort and the mix of labor proposed to perform a specific task on the ordering activity in determining the total price reasonable.

While an established BPA can remain in effect for up to five years (may exceed 5 years to meet program requirements), [210] the contracting officer must review the

[207] FAR 8.405-3(a)(1)
[208] FAR Subsection 13.303-5(b)
[209] FAR 8.405-3(a)(2)
[210] *Id.*, at 8.405-3(c)

BPA annually.[211] The review process must determine: whether the vendor is still under the GSA schedule contract; whether the BPA is still the best value for the Government; and whether additional price reductions could be obtained due to an increase in the amounts of services purchased.[212] In addition, the contracting officer must document the results of the annual review.[213]

F. Pricing – The Current Regulatory and Oversight Scheme

1. Overview

Under current law, contracts that are priced or performed on the basis of cost are subject to the requirement for submission of certified cost or pricing data if they are above the $550,000 threshold. There are exceptions to this requirement, as discussed further below, for competitively awarded contracts (although non-competitive modifications to such contracts may be covered) and for contracts for commercial items (the exception also covers modifications to commercial item contracts). [**MA COMMENT:** This is an awkward summary of TINA that could be misleading. First, TINA only applies to contract pricing and not to actual performance costs. The latter is typically covered by the "Allowable Cost and Payment" clause or something similar. Second, TINA is based on whether the contract action is competed or negotiated. *If negotiated*, the contracting officer is to obtain certified cost or pricing data unless an exception applies. Cost-based pricing is the result of no exception being applicable. As written, Section 1 implies that cost-based pricing is the starting point of the exception process when it is actually the ending point. This subtle difference is very important because it appears that the CPWG is attempting to argue that the exceptions are used to avoid cost-based pricing.]

For commercial item contracts under FAR Part 12, the Government still must determine whether the price is fair and reasonable. Where commercial item contracts are competitively awarded, the issue of price reasonableness is easily addressed. Where commercial item contracts are acquired non-competitively, an issue arises as to what data should reasonably be required to support the contractor's proposed pricing. For price-based acquisitions of commercial items, FAR 15.403-3(c) describes the process the contracting officer must utilize. The contracting officer is directed, "at a minimum" to use price analysis to determine fair and reasonable prices whenever a commercial item is acquired. If price analysis is not sufficient, the contracting officer is directed to use other sources (*e.g.*, market information), and if that is insufficient, authority

[211] *Id.*, at 8.405-3(d).
[212] *Id.*, at 8.405-3(d)(1).
[213] *Id.*, at 8.405-3(d)(2).

exists to obtain information other than cost or pricing data. [**MA COMMENT:** As previously stated, TINA is not silent on this matter. TINA instructs the Government to obtain appropriate information on prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price for the procurement.]

In the grey area where there is little or no competition, where exceptions to fair opportunity are used, or where there is an inadequate response, questions arise as to what types of data the contracting officer can and should obtain in connection with commercial items, whether pressures to get to award discourage asking for information other than cost or pricing data, and what the government audit community does with such data; *i.e.*, is the mindset to treat it no differently than cost or pricing data? [**MA COMMENT:** This is not a grey area for sole source acquisition of commercial items. There is considerable guidance in this area, such as the FAR as well as DoD's pricing guides. Also, industry has for many years raised concerns with contracting officers misapplying TINA and CAS to contracts that would be clearly exempt. Such examples include applying TINA and CAS to competed contracts for commercial items.]

For defense articles, considerable controversy has arisen since this Panel was appointed regarding whether such articles should be considered "commercial items" and whether price-based acquisition of such items should be permitted. [**MA COMMENT**: What are "defense articles?" Either an item meets the definition of commercial item or it doesn't; "defense article" is defined in ITAR for export compliance purposes; it is not defined in the FAR for purposes of government acquisition. The working draft fails to provide any evidence that there is any "controversy" or abuse that would support a recommendation that FAR Part 12 needs revision to preclude "price-based acquisition."]

2. **The Current Truth in Negotiations Act**

The Truth in Negotiations Act ("TINA")[214] requires that a contractor submit certain factual information to the Government for purposes of contract negotiations. The contractor must submit such "cost or pricing data" to the Government and certify that such data are "accurate, complete, and current."[215]

Specifically, unless an exception applies, TINA requires submission of cost or pricing data before the award of any negotiated prime contract, subcontract, or modification to any contract that is expected to exceed $550,000. Unless an exception applies, cost or pricing data also may be required for contract actions

[214] 10 U.S.C. § 2306a, 41 U.S.C. § 254b.
[215] *See* 10 U.S.C. § 2306a(a)(2), 41 U.S.C. § 254b(a)(2).

over $100,000 if the data are necessary to determine whether the offered contract or modification price is fair and reasonable.[216] The FAR encourages[217] contracting officers to "use every available means to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data."

There are several exceptions to the requirement that a contractor submit cost or pricing data.[218] A contractor does not have to provide cost or pricing data if the agreed upon price was based on "adequate price competition"[219] or "prices set by law or regulation."[220] Finally, submission of cost or pricing data is not required for contracts for "commercial items" or modifications to such contracts (provided that such modifications would not change the contract from one for a commercial item to one other than for a commercial item).[221] Notwithstanding, the contracting officer may require information other than cost or pricing data to support a determination of price reasonableness or cost realism.[222] The Government may not require submission of cost or pricing data if an exception applies.[223]

a. What is Cost or Pricing Data?

Cost or pricing data is broadly defined as:

> all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with [TINA], another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.[224]

The FAR further states:

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[216] *See* FAR 15.403-4(a)(2).
[217] FAR 15.402(a)(3).
[218] *See* 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b); FAR 15.403-1.
[219] *See* FAR 15.403-1(b)(1).
[220] FAR 15.403-1(b)(2).
[221] *See* FAR 15.403-1(b)(3).
[222] *See* FAR 15.403-1(b).
[223] See 10 U.S.C. § 2306a(b); 41 U.S.C. § 254a(b).
[224] 10 U.S.C. § 2306a(h)(1); 41 U.S.C. § 254b(h)(1). *See also* FAR 2.101.

> Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.[225]

Thus, cost or pricing data includes a variety of information including, but not limited to, cost information on which the contractor based its price.

The FAR provides some specific guidance in identifying broad categories of information that qualify as cost or pricing data. It states that cost or pricing data includes "such factors as –

> (1) Vendor quotations;
> (2) Nonrecurring costs;
> (3) Information on changes in production methods and in production or purchasing volume;
> (4) Data supporting projections of business prospects and objectives and related operations costs;
> (5) Unit-cost trends such as those associated with labor efficiency;
> (6) Make-or-buy decisions;
> (7) Estimated resources to attain business goals; and
> (8) Information on management decisions that could have a significant bearing on costs.[226]

b. Information Other Than Cost or Pricing Data

When one of the exceptions discussed above applies, the contracting officer "shall not require submission of cost or pricing data to support any action

[225] FAR 2.101. [**MA COMMENT:** Considerable controversy arose early in 2005 over the Air Force's purported interpretation of TINA as including submission of judgments.]
[226] *Id.*

(contracts, subcontracts, or modifications)."[227] Therefore, the prohibition on obtaining such data is explicit. The FAR also states, however, that the contracting officer "may require information other than cost or pricing data to support a determination of price reasonableness or cost realism."[228] [**MA COMMENT:** The preceding discussion misconstrues the regulations and statutory evolution to suggest that since the 1990's the Government has been moving toward getting more data. In fact, the opposite is true. For example, it omits mention of FAR 5.403(a)(1), which states, "the contracting officer should not obtain more information than is necessary."]

The text of TINA provides:

> When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.[229]

The FAR mandates that, in establishing the reasonableness of prices, a contracting officer must not obtain more information than is "necessary."[230] If "the contracting officer cannot obtain information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data."[231]

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[227] *See* FAR 15.403-1(b).
[228] *Id.*
[229] 10 U.S.C. § 2306a(d)(1). *See also* 41 U.S.C. § 254b(d)(1).
[230] *See* FAR 15.402(a).
[231] FAR 15.404-3(a)(1).

In light of the use of the phrase "other than" in conjunction with "cost or pricing data," it is not entirely clear from the TINA statute or the implementing regulation in the FAR what qualifies as "information other than cost or pricing data." Neither statute nor the FAR specify the difference between "cost or pricing data" and "information other than cost or pricing data." For example, it is not clear from the regulation whether the category "information other than cost or pricing data" necessarily encompasses the same types of cost or price-related information as "cost or pricing data," and if it then differs from "cost or pricing data" only in regard to certification and defective pricing implications. [**MA COMMENT:** This is a poor treatment of what "information other than cost or pricing data" means or the reasons why the Government created the definition in the first place. The regulation-writers were quite clear that because TINA was focused on certified "cost or pricing data," there needed to be a label attached to the non-certified submission of similar information on "cost or pricing data."]

Although the FAR does not describe the differences between "cost or pricing data" and "information other than cost or pricing data," it sets forth the following order of precedence for seeking "information other than cost or pricing data" when cost or pricing data are not required and there is no "adequate competition:" [**MA COMMENT:** See definition of "cost or pricing data" and "information other than cost or pricing data" at FAR 2.101. This may be a good time to point out that some confusion might have been caused by the FAR Part 15 rewrite project that eliminated the SF 1411 and SF 1449, among other things.]

> Information related to prices (*e.g.*, established catalog or market prices or previous contract prices), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

> Cost information, that does not meet the definition of cost or pricing data at [FAR] 2.101.[232]

Thus, the order of precedence for "information other than cost or pricing data" looks first to price information and, secondarily, to cost information. The FAR does not further identify or describe "information other than cost or pricing data." [**MA COMMENT:** The text over simplifies the process leaving the impression that the CO either has sufficient pricing information or must ask for other than cost or pricing information. Instead, the CO must look to market information and other information available to the CO first, then, only if all this information proves inadequate can the CO ask the offeror for other than cost or pricing information.]

Under the FAR, "information other than cost or pricing data" may be requested for commercial items where there is no adequate price competition.[233] The FAR provides:

> (i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.
>
> (ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.[234]

[MA COMMENT: The critical determination under the FAR is not whether there is no adequate price competition but whether a fair and reasonable price can be determined without the offeror submitting other than cost or pricing data. If there is adequate price competition, then no data may be requested from the offeror. But it is only if further price analysis, including obtaining information from sources other than the offeror, that the offeror may be requested to submit other than cost or pricing data. These directions in FAR 15.403-3(c)(1) are ignored in the WG draft presenting a false dichotomy between either getting offeror data or not when the FAR already correctly directs CO's to use many other sources and market knowledge to evaluate a price before asking for data.]

[232] FAR 15.402(a)(2)(i), (ii).
[233] *See* FAR 15.403-3(c)(1).
[234] FAR 15.403-3(c)(2)(i), (ii).

The FAR includes instructions (located in Table 15-2) for submission of proposals when a contractor is required to submit cost or pricing data. The table is entitled "Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required." The instructions address various "cost elements," including materials and services, direct labor, indirect costs, and other costs. The FAR provides detailed guidance regarding submission of the information.[235] Although "information other than cost or pricing data" is addressed in FAR Subpart 15.4, the FAR does not include instructions for how to submit "information other than cost or pricing data." Instead, the FAR specifies[236] that the "contractor's format for submitting the information should be used," although FAR 52.215-20 Alternate IV also enables the Government to provide "a description of the information and the format that are required."

3. GSA Schedule Pricing Policies

Because the services and products on GSA schedule contracts are commercial items and such contracts are awarded on commercial terms and conditions, GSA uses a price-based approach to negotiate contract pricing. This approach relies on the prices of the supplies/services that are the same or similar to those in the commercial marketplace. Under this approach, submission of cost or pricing data is not required.

GSA's negotiation objective is to receive prices that are equal to, or better than, a company's "Most Favored Customer (MFC)" pricing for a comparable requirement. To arrive at a price that the Government considers fair and reasonable, offerors are required to submit significant amounts of data pertaining to their commercial sales and discounting practices using the standard Commercial Sales Practices Format.

GSA schedule contracts contain an Economic Price Adjustment clause under which schedule contractors may increase or decrease prices according to their commercial practice. Price decreases may be submitted at any time during the contract period. Price increases, resulting from a reissue or modification of the contractor's commercial catalog that formed the basis for award, can only be made effective on or after the initial 12 months of the contract period and, then, periodically thereafter for the remainder of the contract term. Under a standard GSA clause, MAS contractors are required to maintain and provide current

[235] *See* FAR 15.408 (Table 15-2).
[236] FAR 15.403-3(a)(2).

Federal Supply Schedule Price Lists with detailed data on all price, price-related information, and pertinent ordering instructions (I-FSS-600).

A contractor's pricing and discount information is subject to audit by the GSA Inspector General. GSA schedule contracts also contain a "most-favored customer" clause that requires contractors provide and maintain auditable data establishing that, for the class of item offered, the Government has received the most favorable price and discount arrangement. If it is discovered that the contractor offered more favorable pricing arrangements to its commercial customers, the Government will be entitled to a rebate. GSA's Office of Inspector General uses its investigatory powers (including subpoenas) and the Civil False Claims Act to pursue such rebates. The MAS program thus is unique in that it relies on commercial pricing but uses the audit, investigatory, and fraud prosecution powers of the Government to enforce its price terms. [**MA COMMENT:** For this reason GSA's pricing policies and audit methods have been widely criticized by industry, even to the point of formally petitioning the OFPP Administrator as being inconsistent with law and regulation. Section 1 presents a very unbalanced perspective on this matter.]

MULTI-ASSOCIATION COMMENTS ENDED

II. Commercial Practices – Issues

Specific Issues Identified by the Commercial Practices Working Group

The Commercial Practices Working Panel was tasked with examining commercial practices and how the Government might benefit from them. The Working Group agrees that government access to the commercial marketplace is critical to efficient procurement and that the Government must take advantage of the best commercial practices, to the extent it can do so. To that end, the Working Group focused its efforts on determining the best current commercial practices and how those practices may be used by the Government.

Here are the primary issues examined by the Commercial Practices Working Group.

1. **What are the best commercial practices, particularly for services acquisition, used by commercial buyers in the commercial market place?**

The panel examined how commercial entities acquire services and goods in the commercial market place. In particular, the panel examined how commercial buyers plan for and state their requirements; how they use competition; how they conduct competition; the terms and conditions used in resulting contracts; and the term of typical contracts. The panel also examined how the commercial buyers satisfy themselves about the prices paid and how they established prices in the absence of competition.

2. Can the current statutory and regulatory coverage governing the procurement of commercial items by the Government be improved?

The commercial marketplace is not static. It responds to economic and market incentives**.** The Government's peculiar construct of commerciality has developed for years but was substantially created by FASA and FARA a decade ago. The private sector has continued to evolve its practices. What best practices are in use by the private sector today that the Government can employ? What practices have the private sector left behind?

Is the current definition of "commercial item" adequate? Should the existence of a commercial (*i.e.*, competitive) market be a necessary prerequisite to designating an item or service as "commercial"? Should commercial products and services be treated differently?

Are there typical commercial terms that the Government could use in its commercial services contracts/orders? Should the government standardize basic contract terms, particularly those that impact pricing, *e.g.*, warranty, remedies for breach, limitation of liability, indemnification, *etc.*?

3. What is the nature and quality of competition necessary for buying "commercial" items or services?

Do commercial buyers permit non-competitive contracting? If so, under what circumstances, and pursuant to what restrictions? In a noncompetitive environment, what procedures do commercial firms use to establish a fair and reasonable price? What types of data do commercial firms obtain to support pricing in non-competitive situations? What types of audit rights do commercial firms obtain in non-competitive situations? Can the Government use some of those practices? For commercial item contracts, is there a commercial audit regime that should be used?

Do different competition regimes for federal procurement make sense or should there be a basic standard for competition? Should FAR Part 12 be used for noncompetitive procurements at all? Should a head-to-head competition be a requirement for orders under the GSA Schedules and in task order contracts, or at least in those involving significant dollars? How should noncompetitive purchases be priced? What access to seller data is appropriate in noncompetitive purchases?

4. Can current commercial buying practices by the Government be improved?

Should more emphasis be placed on defining requirement (*i.e.*, who, what, how, and who)? Can the use and disclosure of evaluation factors in competitive awards be improved? Is there adequate integration of the acquisition team (*e.g.*, program manager, contracting officer, functional proponents, subject matter experts, *etc.*). Should orders under interagency contracts be reviewable above a prescribed threshold?

5. What is the commercial practice for use of Time & Materials contracts versus firm fixed-price contracts?

How do commercial buyers use T&M contracts? Is the Government sufficiently different that a separate standard should be applied for use of T&M type contracts?